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UNITED STATES REPORTS

VOLUME 178

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER, TERM 1899

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
JOHN MARSHALL HARLAN, Associate Justice.
HORACE GRAY, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
GEORGE SHIRAS, Jr., Associate Justice.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM, Associate Justice.
JOSEPH McKENNA, Associate Justice.

JOHN WILLIAM GRIGGS, Attorney General.
JOHN KELVEY RICHARDS, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1899.

ROEHM *v.* HORST.

CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 188. Argued March 15, 16, 1900. — Decided May 14, 1900.

After a careful review of all the cases, American and English, relating to anticipatory breaches of an executory contract, by a refusal on the part of one party to it to perform it, the court holds that the rule laid down in *Hochster* v. *De la Tour*, 2 El. & Bl. 678, is a reasonable and proper rule to be applied in this case.

That rule is that after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it; but that an option should be allowed to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option.

The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due.

As to the question of damages, when the action is not premature, the plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself.

THIS was an action for breach of four certain contracts, brought

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by Paul R. G. Horst and others against John Roehm in the Circuit Court of the United States for the Eastern District of Pennsylvania, in January, 1897, and was tried under a stipulation, waiving a jury, before Dallas, Circuit Judge, who made a special finding of facts, and, on the facts so found, gave judgment for plaintiffs. 84 Fed. Rep. 565. The case was carried by defendant to the Circuit Court of Appeals for the Third Circuit, and the judgment of the Circuit Court was affirmed. 62 U. S. App. 520. Thereupon Roehm applied to this court for a writ of certiorari, which was granted, and the cause subsequently heard here.

The Circuit Court found that —

"On August 25th, 1893, the firm of Horst Brothers, composed of Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, the legal plaintiffs, entered into four written contracts with John Roehm, the defendant, of which the following are copies:

"'*Hop Contract.*

"'Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

"'Witnesseth: That the said parties of the first part agree to sell and deliver to the party of the second part, and that the party of the second part agrees to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1896. Three and one half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store, New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

"'Time of shipment, 20 bales each month, October, November, December, January and February, except as hereafter provided.

"'If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted,

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and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within thirty days after receipt of written notice of such decision, submit samples or tender delivery to the party of the second part, other hops, in fulfillment of this agreement, and party of the second part agrees to receive same.

"'In witness whereof, the said parties have hereunto set their hands, Phila., this 25th day of August, 1893.

"'HORST BROS.

"'JOHN ROEHM.'"

[Here followed a second, third and fourth contract, of same tenor and under same date, the second for one hundred bales of the crop of 1896, to be shipped twenty bales each month, in the months of March, April, May, June and July; the third for one hundred bales of the crop of 1897, to be shipped, twenty bales each month, in the months of October, November, December, January and February; and the fourth for one hundred bales of the crop of 1897, to be shipped twenty bales each month, in the months of March, April, May, June, and July.]

"The months named in each of these contracts respectively, as 'time of shipment,' must, under the custom of the trade, be understood as meaning the month so named, which would follow next after the summer months of the year of the crop referred to in the particular contract.

"On June 23d, 1896, the firm of Horst Brothers was dissolved, and Paul R. G. Horst assigned to his copartners, E. Clemens Horst and Louis A. Horst, the use plaintiffs, all the interest of him, the said Paul R. G. Horst in the said contracts.

"Upon June 23d, 1896, a notice, of which the following is a copy, was addressed to and received by the defendant:

"'June 23, 1896.

"'Dear Sir: We beg to inform you that the partnership of Horst Brothers has been this day dissolved.

"'Respectfully yours,

"'HORST BROTHERS.'

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"To this, under date of June 27th, 1896, the defendant replied, saying: . . . 'I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm, . . . which, of course, you cannot fulfill. I therefore consider the contracts annulled and will make other arrangements for the purchase of the hops I may need, and you may consider this as release from liability on your part to comply with the contracts.' In answer to this, Horst Brothers in liquidation addressed a letter to the defendant, which he duly received, in which it was said that he had misconstrued the notice of dissolution sent out to the trade; that its meaning was that no new contracts would be made and no new business undertaken by the firm of Horst Brothers; and in which it was further stated that, 'so far as the firm or business is concerned, the firm will discharge its obligations and will try to collect its claims; it does not ask for any release or discharge, and will punctually live up to all the contracts which it has made with you.' This communication was not replied to.

"In October, 1896, the first shipment of twenty bales of hops under the contracts was made, and the invoice and bill of lading covering that shipment were sent to the defendant, who, on October 24, 1896, by telegram and letter, acknowledged receipt of the bill of lading and bill of particulars, but, upon the ground set up in his letter of June 27, 1896, declined to receive the hops.

"At the time of the defendant's refusal to receive the shipment above mentioned, the plaintiffs could have made subcontracts for forward delivery according to the contracts in suit, at the price of nine cents per pound for 'prime Pacific Coast hops of the crop of 1896,' and of eleven cents per pound for like hops of the crop of 1897; and the difference between the prices fixed by the contracts sued on and these above stated, together with interest on the sum of such differences, from October 24, 1896, to this date, are as follows."

[Here followed the computation resulting in the amount for which judgment was rendered.]

The opinion of the Circuit Court of Appeals stated the case thus:

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Statement of the Case.

"In August, 1893, Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, trading as Horst Brothers, entered into a contract with John Roehm, the defendant below, for the sale of one thousand bales of prime Pacific Coast hops, to be delivered at various dates in the future, at an uniform price of twenty-two cents per pound. Of the whole quantity six hundred bales had been delivered, accepted, and paid for at the contract price, so that in July, 1896, there remained undelivered four hundred bales. These were deliverable at the rate of twenty bales per month during each month from October, 1896, to July, 1898, both inclusive, excepting, however, from said period the months of August and September, 1897, when no deliveries were called for. The record shows that this contract was the result of one negotiation, and provided for a supply of hops for five years. Ten separate papers were drawn, each covering a period of five months or one season. They all bear the same date; are similar as regards the quantity of hops to be delivered, and the price to be paid. They differ only in the time of delivery and the year's crop from which delivery was to be made. In June, 1896, the firm of Horst Brothers was dissolved by the retirement of Paul R. G. Horst. He assigned his interest in the Roehm contract to the remaining partners, who continued the business under the same firm name. Roehm, the defendant below, was notified of this dissolution of the firm and of the transfer of Paul R. G. Horst's interest in the contract to its successors. He thereupon gave notice to the firm that he considered his contract cancelled thereby. Subsequently the firm of Horst Brothers advised the defendant of their ability and willingness to perform the contract, and under date of September 4, 1896, wrote Roehm, as follows:

"'Dear Sir: Will you please write us whether you wish us to ship the hops under your contract direct to your city. The contract calls for delivery in New York, and as we ship direct from this coast we can ship to either city at same rate. Consequently there will be a saving to you of freight if we ship to your city direct from here. Awaiting your reply, we are,

"'Very truly,

"'Horst Brothers.'"

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"To this letter Roehm replied, under date of September 14, 1896:

"'Dear Sirs: In response to your letters dated 3d & 4th inst., state that before shipping me any hops always send me samples from which I can select lots, the same as you have been doing in the past.

"'Very truly,

"'JOHN ROEHM.'

"On October 9, 1896, Horst Brothers advised Roehm of twenty bales of hops per October delivery, as called for by the contract, which Roehm, by telegraph, refused to receive, and as supplementary thereto sent the following letter, dated October 24, 1896:

"'Gentlemen: Yours of October 9, enclosing bill of lading and bill of particulars per twenty bales of hops forwarded me under the terms of contract of August 23, 1893, was received, and I have wired you that I decline to receive the same. I notified you under date of June 27, 1896, that, owing to the dissolution of the copartnership with which I originally contracted and the fact that this firm was no longer in existence, I considered my contract at an end, and will make arrangements for purchasing my supplies elsewhere. I am advised that I am under no obligations by that contract to accept supplies from you. If you desire to bill these goods at the current market rate under a new contract, I will accept them if upon inspection they are of the quality desired; otherwise they will remain at the freight station subject to your order.

"'Very truly yours,

"'JOHN ROEHM.'

"No further efforts were made by Horst Brothers to make delivery under the contract, but in January, 1897, this suit was begun by all the original parties thereto, to the use of the firm as at present constituted, to recover damages for its breach. Judgment was rendered in favor of the plaintiffs."

The contention that Roehm was entitled to treat the contract as determined by the retirement of one of the members of the

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firm of Horst Brothers, and the assignment of his interest to his copartners, was not renewed in this court.

Mr. Samuel Dickson for Roehm. *Mr. R. O. Moon* and *Mr. Richard C. Dale* were on his brief.

Mr. Frank P. Prichard for Horst and others. *Mr. John A. Garver* was on his brief.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

It is conceded that the contracts set out in the finding of facts were four of ten simultaneous contracts, for one hundred bales each, covering the furnishing of one thousand bales of hops during a period of five years, of which six hundred bales had been delivered and paid for. If the transaction could be treated as amounting to a single contract for one thousand bales, the breach alleged would have occurred while the contract was in the course of performance; but plaintiffs' declaration or statement of demand averred the execution of the four contracts, "two for the purchase and sale of Pacific Coast hops of the crop of 1896, and two for the purchase and sale of Pacific Coast hops of the crop of 1897," set them out *in extenso*, and claimed recovery for breach thereof, and in this view of the case, while as to the first of the four contracts, the time to commence performance had arrived, and the October shipment had been tendered and refused, the breach as to the other three contracts was the refusal to perform before the time for performance had arrived.

The first contract falls within the rule that a contract may be broken by the renunciation of liability under it in the course of performance and suit may be immediately instituted. But the other three contracts involve the question whether, where the contract is renounced before performance is due, and the renunciation goes to the whole contract, and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. Defendant repudiated all

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liability for hops of the crop of 1896 and of the crop of 1897, and notified plaintiffs that he should make (according to a letter of his attorney in the record that he had made) arrangements to purchase his stock of other parties, whereupon plaintiffs brought suit. The question is, therefore, presented, in respect of the three contracts, whether plaintiffs were entitled to sue at once or were obliged to wait until the time came for the first month's delivery under each of them.

It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly.

And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it, has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods. The cases are extensively commented on in the notes to *Cutter* v. *Powell*, 2 Smith's Leading Cases, 1212, 1220, 9th edition by Richard Henn Collins and Arbuthnot. Some of these, though quite familiar, may well be referred to.

In *Hochster* v. *De la Tour*, 2 El. & Bl. 678, plaintiff, in April, 1852, had agreed to serve defendant, and defendant had undertaken to employ plaintiff, as courier, for three months from June first, on certain terms. On the eleventh of May, defendant wrote plaintiff that he had changed his mind, and declined to avail himself of plaintiff's services. Thereupon, and on May twenty-second, plaintiff brought an action at law for breach of contract in that defendant, before the said first of June, though plaintiff was always ready and willing to perform, refused to engage plaintiff or perform his promise, and then wrongfully exonerated plaintiff from the performance of the agreement, to his damage. And it was ruled that as there could be a breach of contract before the time fixed for performance, a positive and

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absolute refusal to carry out the contract prior to the date of actual default amounted to such a breach.

In the course of the argument, Mr. Justice Crompton observed: "When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. The word 'rescind' implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty.'"

In delivering the opinion of the court, (Campbell, C. J., Coleridge, Erle and Crompton, JJ.), Lord Campbell, after pointing out that at common law there were numerous cases in which an anticipatory act, such as an act rendering the contract impossible of performance, or disabling the party from performing it, would constitute a breach giving an immediate right of action, laid it down that a positive and unqualified refusal by one party to carry out the contract should be treated as belonging to the same category as such anticipatory acts, and said, p. 690:

"But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st of June, he is

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prejudiced by putting faith in the defendant's assertion; and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July and August, 1852; according to decided cases, the action might have been brought before the 1st of June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages: but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case."

In *Frost* v. *Knight*, L. R. 7 Ex. 111, defendant had promised to marry plaintiff so soon as his (defendant's) father should die. While his father was yet alive he absolutely refused to marry plaintiff, and it was held in the Exchequer Chamber, overruling the decision of the Court of Exchequer, L. R. 5 Ex. 322, that for this breach an action was well brought during the father's lifetime. Cockburn, C. J., said: "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention

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not to perform it, as established by the cases of *Hochster* v. *De la Tour*, 2 E. & B. 678, and the *Danube & Black Sea Company* v. *Xenos*, 13 C. B. (N. S.) 825, on the one hand, and *Avery* v. *Bowden*, 5 E. & B. 714, *Reid* v. *Hoskins*, 6 E. & B. 953, and *Barwick* v. *Buba*, 2 C. B. (N. S.) 563, on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

The case of *Danube Company* v. *Xenos*, 11 C. B. (N. S.) 152, is stated in the headnotes thus: On the 9th of July, A, by his agent, agreed to receive certain goods of B on board his ship to be carried to a foreign port, — the shipment to commence on the 1st of August. On the 21st of July A wrote to B, stating that he did not hold himself responsible for the contract, the agent having no authority to make it; and on the 23d he wrote again offering a substituted contract, but still repudiating the original contract. B by his attorneys gave A notice that he should hold him bound by the original contract, and that, if he persisted in refusing to perform it, he (B) should forthwith proceed to make other arrangements for forwarding the goods to their destination, and look to him for any loss. On the 1st of August, A again wrote to B, stating that he was then prepared to receive the goods on board his ship, making no allusion to

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the original contract. B had, however, in the meantime entered into a negotiation with one S for the conveyance of the goods by another ship, which negotiation ended in a contract for that purpose with S on the 2d of August. B thereupon sued A for refusing to receive the goods pursuant to his contract; and A brought a cross action against B for refusing to ship. Upon a special case stating these facts: Held, that it was competent to A to treat B's renunciation as a breach of the contract; and that the fact of such renunciation afforded a good answer to the cross action of A, and sustained B's plea that before breach A discharged him from the performance of the agreement.

Erle, C. J., said (p. 175): "In *Cort* v. *Ambergate Railway Company*, 17 Q. B. 127, it was held, that, upon the company giving notice to Mr. Cort that they would not receive any more of his chairs, he might abstain from manufacturing them, and sue the company for the breach of contract without tendering the goods for their acceptance. So, in *Hochster* v. *De la Tour*, 2 El. & Bl. 678, it was held that the courier whose services were engaged for a period to commence from a future day, being told before that day that they would not be accepted, was at liberty to treat that as a complete breach, and to hire himself to another party. And the boundary is equally well ascertained on the other side. Thus, in *Avery* v. *Bowden*, 5 El. & Bl. 714; 6 El. & Bl. 953, where the agent of the charterer intimated to the captain, that, in consequence of the breaking out of the war, he would be unable to furnish him with a cargo, and wished the captain to sail away, and the latter did not do so, it was held not to fall within the principle already adverted to, and not to amount to a breach or renunciation of the contract. But where there is an explicit declaration by the one party of his intention not to perform the contract on his part, which is accepted by the other as a breach of the contract, that beyond all doubt affords a cause of action."

The case was heard on error in the Exchequer Chamber before Cockburn, C. J., Pollock, C. B., Wightman, J., Crompton, J., Channel, B., and Wilde, B; and the judgment of the Common Pleas was unanimously affirmed. 13 C. B. (N. S.) 825.

In *Johnstone* v. *Milling*, 16 Q. B. Div. 467, Lord Esher, Mas-

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ter of the Rolls, puts the principle thus: "When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation."

Lord Justice Bowen said (p. 472): "We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor not to carry out the contract when the time for performance arrives, may treat the contract as broken, and sue for a breach thereof. It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such."

The doctrine which thus obtains in England has been almost universally accepted by the courts of this country, although the precise point has not been ruled by this court.

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In *Smoot's Case*, 15 Wall. 36, 48, Mr. Justice Miller observed: "In the case of *Philpotts* v. *Evans*, 5 M. & W. 475, the defendant, who had agreed to receive and pay for wheat, notified the plaintiff, before the time of delivery, that he would not receive it. The plaintiff tendered the wheat at the proper time, and the only question raised was, whether the measure of damages should be governed by the price of the wheat at the time of the notice or at the time of the tender. Baron Parke said: 'I think no action would have lain for the breach of the contract at the time of the notice, but that plaintiff was bound to wait until the time of delivery to see whether the defendant would then receive it. The defendant might have chosen to take it and would have been guilty of no breach of contract. His contract was not broken by his previous declaration that he would not accept.' And though some of the judges in the subsequent case of *Hochster* v. *De la Tour*, 2 El. & Bl. 678, disapprove very properly of the extreme ground taken by Baron Parke, they all agree that the refusal to accept, on the part of the defendant, in such case, must be absolute and unequivocal and must have been acted on by the plaintiff."

In *Lovell* v. *St. Louis Life Insurance Company*, 111 U. S. 264, a life insurance company had terminated its business and transferred its assets and policies to another company, and the court held that this in itself authorized the insured to treat the contract as at an end, and to sue to recover back the premiums already paid, although the time for the performance of the obligation of the insurance company, to wit, the death of the insured, had not arrived. Mr. Justice Bradley, delivering the opinion of the court, said: "Our third conclusion is, that as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his power to per-

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form it, the other party may regard it as terminated and demand whatever damages he has sustained thereby."

In *Dingley* v. *Oler*, 117 U. S. 490, it was held that the case did not come within the rule laid down in *Hochster* v. *De la Tour*, but within *Avery* v. *Bowden* and *Johnstone* v. *Milling*, since, in the view entertained by the court, there was not a renunciation of the contract by a total refusal to perform.

So in *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255, 264, involving a contract for the delivery of iron ore, the court said: "The necessary conclusion is that the defendant was justified in refusing to accept any of the iron shipped in 1881; and whether the notice, previously given by the defendant to the plaintiff, that it would not accept under the contract any iron made after December 31, 1880, might have been treated by the plaintiffs as a renunciation and a breach of the contract, need not be considered, because the plaintiffs did not act upon it as such."

In *Anvil Mining Company* v. *Humble*, 153 U. S. 540, performance had been commenced, but completion was prevented by defendant, and Mr. Justice Brewer, speaking for the court, said: "Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about."

In *Pierce* v. *Tennessee Coal & Railroad Company*, 173 U. S. 1, it was held that on discharge from a contract of employment, the party discharged might elect to treat the contract as absolutely and finally broken, and in an action to recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past, deducting any sum that he might have earned or that he might thereafter earn; and Mr. Justice Gray said: "The plaintiff was not bound to wait to see if the defendant would change its decision and take him back into its service; or to resort to

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successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representatives after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract."

In *Hancock* v. *New York Life Insurance Company*, 11 Fed. Cas. 402, *Hochster* v. *De la Tour* was followed by Bond, J., in the Circuit Court for the Eastern District of Virginia; and in *Grau* v. *McVicker*, 8 Biss. 13, Drummond, J., fully approved of the principles decided in that case, and remarked: "It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterwards or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages."

Again, in *Dingley* v. *Oler*, 11 Fed. Rep. 372, Lowell, J., applied the rule in the Circuit Court for the District of Maine, and, after citing *Hochster* v. *De la Tour*, *Frost* v. *Knight*, and other cases, said: "These cases seem to me to be founded in good sense, and to rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic." And see *Foss Brewing Company* v. *Bullock*, 16 U. S. App. 311; *Hines Lumber Company* v. *Alley*, 43 U. S. App. 169; *Marks* v. *Van Eeghen*, 57 U. S. App. 149.

The great weight of authority in the state courts is to the same effect, as will appear by reference to the cases cited in the margin.[1]

On the other hand, in *Greenway* v. *Gaither*, Taney, 227,

[1] *Fox* v. *Kitton*, 19 Ill. 518; *Kadish* v. *Young*, 108 Ill. 170; *Roebling's Sons' Co.* v. *Lock Co.*, 130 Ill. 660; *Lake Shore R. R. Co.* v. *Richards*, 152 Ill. 59; *Burtis* v. *Thompson*, 42 N. Y. 246; *Windmuller* v. *Pope*, 107 N. Y. 674; *Mountjoy* v. *Metzger*, 9 Phila. 10; *Zuck* v. *McClure*, 98 Penn. St. 541; *Hocking* v. *Hamilton*, 158 Penn. St. 107; *Dugan* v. *Anderson*, 36 Maryland, 567; *Hosmer* v. *Wilson*, 7 Michigan, 294; *Platt* v. *Brand*, 26 Michigan, 173; *Crabtree* v. *Messersmith*, 19 Iowa, 179; *McCormick* v. *Basal*, 46 Iowa, 235; *Kurtz* v. *Frank*, 76 Indiana, 594; *Cobb* v. *Hall*, 33 Vermont, 233; *Davis* v. *Grand Rapids Co.*, 41 W. Va. 717; and other cases cited in the text books and encyclopædias.

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Mr. Chief Justice Taney sitting on circuit in Maryland, declined to apply the rule in that particular case. The cause was tried in November, 1851, and more than two years after, at November term, 1853, application was made to the Chief Justice to seal a bill of exceptions. *Hochster* v. *De la Tour* was decided in June, 1853, and the decision of the Circuit Court had apparently been contrary to the rule laid down in that case. The Chief Justice refused to seal the bill, chiefly on the ground that under the circumstances the application came too late, but also on the ground that there was no error, as the rule was only applicable to contracts of the special character involved in that case, and the Chief Justice said as to the contract in hand, by which defendant engaged to pay certain sums of money on certain days: "It has never been supposed that notice to the holder of a bond, or a promissory note, or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate cause of action, upon which he might sue before the time of payment arrived."

The rule is disapproved in *Daniels* v. *Newton*, 114 Mass. 530, and in *Stanford* v. *McGill*, 6 N. Dak. 536, on elaborate consideration. The opinion of Judge Wells in *Daniels* v. *Newton* is generally regarded as containing all that could be said in opposition to the decision of *Hochster* v. *De la Tour*, and one of the propositions on which the opinion rests is that the adoption of the rule in the instance of ordinary contracts would necessitate its adoption in the case of commercial paper. But we are unable to assent to that view. In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule.

In *Nichols* v. *Scranton Steel Company*, 137 N. Y. 471, 487, Mr. Justice Peckham, then a member of the Court of Appeals of New York, thus expresses the distinction: "It is not intimated that in the bald case of a party bound to pay a promissory note which rests in the hands of the payee, but which is not yet due, such note can be made due by any notice of the maker that he does not intend to pay it when it matures. We decide simply this case where there are material provisions and

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obligations interdependent. In such case, and where one party is bound, from time to time, as expressed, to deliver part of an aggregate and specified amount of property to another, who is to pay for each parcel delivered at a certain time and in a certain way, a refusal to be further bound by the terms of the contract or to accept further deliveries, and a refusal to give the notes already demandable for a portion of the property that has been delivered, and a refusal to give any more notes at any time or for any purpose in the future, or to pay moneys at any time, which are eventually to be paid under the contract, all this constitutes a breach of the contract as a whole, and gives a present right of action against the party so refusing to recover damages which the other may sustain by reason of this refusal."

We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the purchase and sale of goods.

The other proposition on which the case of *Daniels* v. *Newton* was rested is that until the time for performance arrives, neither contracting party can suffer any injury which can form a ground of damages. Wells, J., said: "An executory contract ordinarily affords no title or interest in the subject matter of the agreement. Until the time arrives when, by the terms of the agreement he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action."

But there are many cases in which before the time fixed for performance, one of the contracting parties may do that which amounts to a breach and furnishes a ground of damages. It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract; yet this would seem to be inconsistent with the reasoning in *Daniels* v. *Newton*, though it is not there in terms decided "that

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an absolute refusal to perform a contract, after the time and under the conditions in which plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future." *Parker* v. *Russell*, 133 Mass. 874.

In truth, the opinion goes upon a distinction between cases of renunciation before the arrival of the time of performance and those of renunciation of unmatured obligations of a contract while it is in course of performance, and it is said that before the argument on the ground of convenience and mutual advantage to the parties can properly have weight, "the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case."

We think that there can be no controlling distinction on this point between the two classes of cases, and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a *locus penitentiæ* be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction *per se* is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance?

As Lord Chief Justice Cockburn observed, in *Frost* v. *Knight*, the promisee has the right to insist on the contract as subsisting and effective before the arrival of the time for its performance, and its unimpaired and unimpeached efficacy may be essential to his interests, dealing as he may with rights acquired under it in various ways for his benefit and advantage. And of all

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such advantage, the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. While by acting on such repudiation and the taking of timely measures, the promisee may in many cases avert, or, at all events, materially lessen the injurious effects which would otherwise flow from the nonfulfillment of the contract.

During the argument of *Cort* v. *Ambergate Railway Company*, 17 Q. B. 127, Erle, J., made this suggestion: "Suppose the contract was that plaintiff should send a ship to a certain port for a cargo, and defendant should there load one on board; but defendant wrote word that he could not furnish a cargo; must the ship be sent to return empty?" And if it was not necessary for the ship owner to send his ship, it is not perceived why he should be compelled to wait until the time fixed for the loading of the ship at the remote port before bringing suit upon the contract.

If in this case these ten hop contracts had been written into one contract for the supply of hops for five years in instalments, then when the default happened in October, 1896, it cannot be denied that an immediate action could have been brought in which damages could have been recovered in advance for the breach of the agreement to deliver during the two remaining years. But treating the four outstanding contracts as separate contracts, why is it not equally reasonable that an unqualified and positive refusal to perform them constitutes such a breach that damages could be recovered in an immediate action? Why should plaintiff be compelled to bring four suits instead of one? For the reasons above stated, and having reference to the state of the authorities on the subject, our conclusion is that the rule laid down in *Hochster* v. *De la Tour* is a reasonable and proper rule to be applied in this case and in many others arising out of the transactions of commerce of the present day.

As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by

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reason of circumstances of which he ought reasonably to have availed himself. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. *Hinckley* v. *Pittsburg Company*, 121 U. S. 264. Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle prevails, and he may show what was the value of the contract by showing for what price he could have made subcontracts, just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain.

In this case plaintiffs showed at what prices they could have made subcontracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed.

Judgment affirmed.

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OSBORNE *v.* SAN DIEGO LAND AND TOWN COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 201. Argued March 19, 1900. — Decided May 14, 1900.

The appropriation and disposition of water in California is a public use, and the right to collect tolls or compensation for it is a franchise, subject to regulation and control in the manner prescribed by law, and such tolls cannot be fixed by the contract of the parties.

It is not for the court to go into the reasonableness of the established rates, which are sought to be enforced in this case, but if the consumers are dissatisfied with them, resort must first be had to the body designated by law to fix proper rates, the board of supervisors of the county.

THIS was a bill in equity to review and reverse a decree entered in the United States Circuit Court for the Southern District of California in a suit in which Charles D. Lanning, receiver of the San Diego Land and Town Company of Kansas, was complainant, and appellants herein were respondents, and in which the appellee was substituted before decree as complainant in lieu of said Lanning.

The bill is extremely voluminous, reciting all the pleadings and proceedings in the original suit.

The following is a condensed summary of them:

The bill, in addition to the incorporation of the company and the appointment of a receiver of its assets and affairs, alleged that it was the owner of valuable water, and water rights, reservoirs and an entire water system for furnishing water to consumers, and that it had a franchise for impounding, sale and disposition of the waters owned and stored by it to the respondents and other consumers, and to the city of National City and its inhabitants.

The company's supply of water came from the Sweetwater River, a small stream about five miles from the city of National City, and its means of distributing the water, which were de-

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scribed, could supply but a limited amount of territory, consisting of farming lands within and outside of said city, and in part of the residence portion of the city.

The company in procuring the water and its distributing system had expended up to January 1, 1896, the sum of $1,022,473.54, which was reasonably necessary for the purposes.

By the said expenditure it had procured and owned, "subject to the public use and the regulation thereof by law," water and water rights, a reservoir site, and a reservoir of the capacity of six thousand million gallons, and had constructed mains necessary to supply the defendants and their lands, and had constructed and put in the mains and pipes necessary therefor, and was at the time mentioned in the bill furnishing the defendants and each of them with water.

The defendants are the owners respectively of tracts of land under the system of the company, most of them of only a few acres each, and each became the owner of a water right to a part of the water of the company necessary to irrigate his tract of land, and became liable to pay for a yearly rental such as the company was entitled to charge and collect.

The annual expense of the system and its operation, including interest on its bonds, and excluding the natural and necessary depreciation, was $33,034.77, and to pay this expense and income of six per cent on the amount invested on the 1st of January, 1896, it was necessary that the rates for water be fixed to realize $119,791.66.

The amount realized outside of the city of National City for that year was about $15,000, and no more than that sum could be probably realized for the year ending January 1, 1897.

The mains and pipes were perishable, and required to be replaced at least once in sixteen years, and required frequent repairs.

To acquire the water and construct the system, the company was compelled to borrow $300,000, and to pay interest in the sum of $21,000 annually, which must be realized from the sale of its water, and was part of its operating expenses, and the share of its revenues which should be raised in the city of National City was about one third, and the amount which could

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be raised from said city at the rates which prevailed under the ordinance mentioned in the bill was about $10,715 per annum, and no more.

The value of its water franchises and system was one million one hundred thousand dollars.

No other person or corporation was furnishing water to defendants, nor was there any other system by which they could be furnished, but the franchises and the rights of the company were not exclusive.

The city of National City was a municipal corporation of California, of the sixth class, and the board of trustees thereof, claiming to act under the constitution and laws of the State, passed an ordinance fixing the rates to be charged for water sold and furnished by the company to consumers of the city.

The company commenced to furnish water in the year 1887, and was informed by its engineer that its system and supply of water would furnish to consumers sufficient to irrigate twenty thousand acres, and in addition what would be necessary for domestic use inside and outside of said city. The company was unfamiliar with the operation of the plant and system constructed and the cost of operating and maintaining them, and relying upon the estimates of the engineer, and believing that an annual rate of $3.50 per acre would be sufficient, fixed the rate at such sum, and had charged it until January 1, 1896, but instead of being able to supply sufficient water to irrigate twenty thousand acres, it had been demonstrated by actual experience that the system would not supply sufficient to irrigate, to exceed seven thousand acres, together with water demanded for domestic use, and it was believed not to exceed six thousand acres, although there were about ten thousand acres under the system susceptible of irrigation.

At the rate of $3.50 per acre, even if all the lands of the system should be supplied with water and the rates in National City should be maintained, the company would not be able to pay operating expenses and maintain its plant, and the money invested in it would be lost, and the company would be compelled to furnish water at a loss, as it had been furnishing water at a loss, and its system had been going gradually to decay con-

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sequent upon the want of revenue and means to replace the same.

To pay cost of operating and maintaining its system and a reasonable interest it was necessary to charge $7.00 for irrigation purposes, and said sum was a reasonable rate for consumers to pay, and the smallest amount for which the company could furnish water without loss.

By the laws of California the board of supervisors might upon petition of twenty-five inhabitants and taxpayers of the county fix the yearly rental for water, but no such petition had been presented or rates fixed in the case of the company.

For the reasons above stated the company gave notice to the defendant that on January 1, 1896, it would establish a rental of $7.00 per acre.

The defendants and each of them refused to pay such sum, and maintain that neither the company nor its receiver had the power to increase the rental, and that the former rate must be and remain the rental until the board of supervisors establish one as provided by law.

The increase of the rental was absolutely necessary to maintain and operate the plant.

To enforce the rental the complainant caused the water to be shut off the premises of each of the defendants, and each of them threatened and would, unless restrained by the court from doing so, commence a suit in the Superior Court of San Diego County, California, to compel complainant to turn on and furnish water again, claiming the use for $3.50 per acre, and for damages. The rights of the defendants and the determination of the question of the right of the company would affect all in the same way and extent, except the quantity of land owned by the several defendants was different.

The bringing of said suits would involve complainant in a multiplicity of suits, would hinder him in the operation of the property of the company and the settlement of its debts and obligations, and the questions involved could better be settled in one suit.

The increase in rates would add to the revenue of the company with the amount of land now under irrigation, not less

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than $14,000 per annum, and upon the whole of the land which could be irrigated not less than $20,000 per annum.

There were allegations of the legal character of certain of the defendants, and the bill concluded with the following prayer:

"Wherefore your orator prays your honors to grant to him the writ of injunction against the defendants and each of them, enjoining them from prosecuting in the state courts or elsewhere separate actions against your orator or said land and town company; that said defendants and each of them be required to appear in this suit and set up any claims they may have against the right of your orator or said company to increase the rental for water furnished by said company, as aforesaid, and that it be finally decreed by this court that your orator, as such receiver, and said company have the right to increase the amount of its rentals to any reasonable sum, and that the sum of $7.00 per acre per annum is a reasonable rental to be charged, and that the defendants and each of them be required to pay said rate as a condition upon which water shall be furnished to them, and that your orator shall have generally such other and further relief as the nature of his case may require."

The answer was very long and somewhat confused by repetitions. The substance of it is given in the opinion of the Circuit Court. 76 Fed. Rep. 319.

It is sufficient for the purpose to say that its allegations and defences were based on the claim that the supply and system of the company were subject "to the water rights, easements in and servitudes upon said reservoir and system, and to all other rights acquired by these defendants therein . . . and annexed to the respective parcels of lands of these defendants. And also each such water right and easement was in freehold and was a freehold servitude imposed upon said water system for the benefit of the land to which it was appurtenant, and that all claims and demands of said company for the price or compensation therefor had been paid or otherwise satisfied by purchase or otherwise, as in the bill of complaint alleged." And such rights extended to and included the right to have the company maintain that system efficiently to conduct the water to the premises of each of the defendants for irrigation, and other

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uses, at "the annual rates to be deemed and accepted as the legally established rates therefor under the facts hereinafter set forth."

These facts were, besides those stated in the opinion, that each defendant and all of them paid the full amount demanded by the company as the price of the perpetual easement of water supply from the system granted and annexed to their lands, and that they were forever discharged from the payment of any further sum to apply on the principal of or as income upon the cost or value of the system or debt incurred for its construction or the value of their respective water rights. And that in these respects the company had put all lands on an equal footing, and they had remained on the same footing for more than five years, and in many cases had changed hands; that the value of the water rights had for more than five years entered into the market value of the lands and the price paid to their vendors by the defendants, who were their successors in title, and they were induced to purchase, improve and settle upon their respective parcels on account of the rate of $3.50 per acre per annum, and it entered into and became a material element of their value.

That by the constitution of the State of 1879, it is provided in article XIV, section 1, among other things, as follows, to wit:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law."

"SEC. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

And in pursuance of the provision the legislature passed an act approved March 12, 1885, entitled "An act to regulate and control the sale, rental and distribution of water in this State other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use."

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The act provided that the sale and distribution of appropriated water was a public use, and the right to collect compensation therefor a franchise, and, except when furnished by a city or town, should be regulated and controlled by the board of supervisors of the counties of the State in the manner prescribed, and that the board might establish different rates as the case might be, and different rates for the several different uses, such as mining, irrigating, etc., for which the water should be applied, and the rates fixed should be binding and conclusive for a year, until established anew or abrogated. And it was provided that until the boards of supervisors establish rates, the rates "actually established and collected . . . should be deemed and accepted as the legally established rates."

That the rate of $3.50 per acre was the only actual rate for irrigation which had ever been established and collected by the company or its receiver, or assented to by consumers.

That they each had since January 1, 1896, paid the rate of $3.50 per acre to the complainant as receiver, and were willing and offered to pay the same as long as it should be legally established. And it was averred that in so far as the act of 1885 purported to prohibit the company from the sale of servitudes in freehold upon its system, or to contract respecting the same, or to receive full compensation from any consumer therefor who was willing to contract for the same, and to prescribe that such easement should be used only upon the terms and conditions that the owners render net annual receipts and profits upon the value thereof in perpetuity, or to prohibit contracts respecting the annual receipts, or to extinguish and satisfy the right of the company to such net annual receipts, the same was unconstitutional and void, and in conflict with the Fourteenth Amendment of the Constitution of the United States, and section 1, article 9, of the constitution of the State.

That the liability of the defendants to pay rates was several, not joint, and that certain of the defendants were not residents of the State, certain others not residents of the county of San Diego and others were school districts, and that none of them were competent to make petition to the board of supervisors, as required in the act of 1885, and said act, as far as it pur

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ported to authorize the company to increase the rates of $3.50 per acre, was in violation of the Fourteenth Amendment of the Constitution of the United States, and deprived each of them of his or her property without due process of law, and to each of them the equal protection of the laws.

That in so far as the statute of 1885 purported to authorize the company to shut off water from the lands of defendants or to increase the rate without consent of the defendants, or to permit its collection without giving the defendants a standing in court to contest the reasonableness of the increase, was also in violation of said Fourteenth Amendment. And, also, that the complainant, by shutting off water, violated that amendment.

The bill of review then averred that there were exceptions taken to the answer on the ground that it did not set forth or discover relative and material matters of fact tending to show that the bill was not true or in confession or avoidance thereof, but instead set forth immaterial and irrelevant matter.

Each exception was specific, but altogether they went to the whole answer except its admissions and certain of its denials.

It was prayed that the defendants be compelled to amend the answer, and to put in a full and sufficient one.

The exceptions coming on to be heard, they were sustained — the defendants excepted.

By order of the court, on motion of complainant, Charles D. Lanning was discharged as receiver, and the San Diego Land and Town Company of Maine was substituted as complainant — defendants excepted.

A notice was given of a motion to be made that the bill in the suit be taken *pro confesso*, and a decree of the court be taken accordingly, on the ground that the exceptions to the answer had been sustained and no amended answer had been filed within the time allowed.

The motion came on to be heard, and pending its hearing, the defendants gave notice of a motion to dismiss the suit on the ground that the receiver had been discharged, the property had been sold under foreclosure, and had passed into the hands of another corporation; that the San Diego Land and Town Com-

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pany of Maine was not the successor of the receiver, and had no interest or right to prosecute the action, and that the board of supervisors of San Diego County had fixed the rates of the company.

The two motions came on to be heard on the 2d of January, 1898, and the motion to dismiss was denied, and the motion that the bill be taken *pro confesso* against all the defendants was granted, and a decree ordered to be entered according to the opinion of the court. The defendants excepted.

The bill of review further averred that the court caused to be entered, greatly to the prejudice of the orators, its decree, which was set out at length. It further averred that the defendants had paid the costs adjudged against them, and detailed at length their exceptions to the ruling of the court. The exceptions reasserted the materiality and sufficiency of the averments of the answer, contended that the court misapprehended them, and erroneously treated and considered the exceptions as raising for discussion the merits of the case, and by expunging the answer from the records, deprived the defendants of the right to have the merits of their defences on their face regularly determined upon the setting of the cause for hearing on bill and answer or upon issues raised and proofs made.

The bill of review asserted further errors against the decree in that it denied the rights alleged in the answer of defendants, and so construed and enforced the constitution and statutes of the State as to violate section 1, article 14, of the Constitution of the United States, in that it maintained the company and the receiver in increasing the rate, and the condition of nonpayment the right to shut off the water from the lands of the defendants, and thereby deprived them of the equal protection of the laws and of their property without due process of law. And further, because it was an exercise of judicial power to the same end, and to the deprivation of the right of contract without due process of law. Also denied to the State a republican form of government, guaranteed by section 4, article 4, of the Constitution of the United States, in that, as enforced and applied, the State assumed the absolute control of all water

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appropriated and all works for its distribution, abolished capacity to acquire property, rights and servitudes in such water and waterworks absolutely, or with ownership of lands for irrigation, or free from the perpetual obligation to pay net revenue of not less than six nor more than eighteen per cent per annum upon the cost or value of the water system; and abolished the right or capacity to ascertain, fix or define, by contract or convention, the rate of compensation to be paid by any consumer for the supply of water for irrigation of land.

Error was also asserted in the decree in that it was in favor of the San Diego Land and Town Company, of Maine, although it had not become a party to the cause, by supplemental bill or otherwise, and because what interest it had did not appear, nor was its claim to any interest set forth, so that the defendant could answer or plead thereto. Also, error in that the court had no jurisdiction to entertain the cause or make any decree on the merits, and error in not dismissing the suit after the discharge of Lanning, the receiver and complainant.

The bill concluded with the following prayer:

"Wherefore, as said errors appear on the face of the record, and are greatly prejudicial to complainants and their rights in the premises, complainants pray that said decree may be reviewed, reversed and set aside, and no further proceedings taken therein; and to that end complainants pray process by subpœna against the San Diego Land and Town Company, of Maine, requiring it to appear and answer hereunto, and show cause, if it may, why said decree should not be reviewed, reversed and set aside, and such further orders and decrees be made as to the court may seem just, including the restoration to your orators of the sum of money paid under said decree, as aforesaid."

The defendant (appellee) moved the court to strike the bill from the files and dismiss the suit.

The motion was denied. The water company then demurred to the bill on the grounds that it appeared therefrom that there was no error in the proceeding and decision in *Lanning* v. *Osborne*, appearing on the face of the record or otherwise; that complainants were not entitled to the relief prayed for, or any relief; that no error appeared in said suit which could be re-

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lieved by a bill of review or a bill in the nature of a bill of review; that the remedy of complainants was by appeal.

The demurrer was sustained with leave to complainants to amend the bill in ten days.

The complainants elected to stand on their bill, and decree was entered on the demurrer as follows:

"It is therefore considered and decreed by the court that the plaintiffs take nothing by their bill herein; that said bill be, and the same is hereby, dismissed, and that the defendant have and recover of and from the plaintiffs its costs in this behalf laid out and expended, taxed at $20.50."

The case was then brought here.

Mr. Alfred Haines for appellants.

Mr. John D. Works for appellee. *Mr. Lewis R. Works*, *Mr. Bradner W. Lee* and *Mr. Charles D. Lanning* were on his brief.

Mr. John Garber and *Mr. Frank H. Short* filed a brief as *Amici Curiæ*.

Mr. Justice McKenna, after making the above statement, delivered the opinion of the court.

One of the grounds of demurrer to the bill was that it appeared from the complainants' own showing that their remedy was by appeal and not by bill of review. It is not pressed with much earnestness here, and is clearly untenable. *Whiting* v. *United States Bank*, 13 Pet. 6; *Putnam* v. *Day*, 22 Wall. 60; *Buffington* v. *Harvey*, 95 U. S. 99; *Ensminger* v. *Powers*, 108 U. S. 292; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1; Story's Equity Pl. 10th ed. sec. 403 *et seq.*

The principal contention of the appellants is that the water rights are easements in the real estate constituting the water system. In other words, (as described by appellants) "incorporeal interests in the corporeal property of a water system annexed to lands irrigated by that system." Being such, the corporation may sell them, the land owner may contract for them

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— may buy them outright and free himself wholly from annual rates, or may stipulate for a particular rate. In other words, that the water right is an interest in the system, paid for with the land, or by the stipulated rate, and not subject to any rate or to increase beyond the stipulated rate, according to the varying expenses or valuations of the system.

It is claimed to be property, and the right to sell and to buy it is asserted respectively for the owner of the system and the consumers of its waters, and that the constitution and laws of the State of California do not prohibit this, or if they can be construed to do so, violate the Fourteenth Amendment of the Constitution of the United States by depriving appellants of their property without due process of law, and violate also certain provisions of the constitution of the State of California.

It is further contended by appellants that conceding a contract cannot be made between "water corporations" and their customers for a particular rate which will preclude regulation by the State, that until such regulation the parties—company and consumers—may contract. And, further, that the rate of $3.50 per acre per annum was the rate charged and collected by the company, and therefore became the rate established by law by virtue of a provision in section 5 of the statute of 1885, hereafter quoted.

It is also contended that the answer in the original suit averred the rate of $3.50 per acre per annum was a reasonable rate, and denied that the increased rate of $7.00 per acre was reasonable, and that on the issue thus raised, the defendants there, complainants in the bill of review, were entitled to a hearing.

The charge of error in the decrees is based on their adjudging against these contentions.

Opposing the contentions of appellants, the appellee makes a distinction between the facilities for the use and the right to use the water of its system and the actual use of it. The compensation for the former, appellee concedes may be the subject of contract; the rate for the latter, it contends, is subject to reg-

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ulation by law, but, until so regulated, may be established by the water companies.

The Circuit Court did not accept the distinction made by appellee. It did not accept the view contended for by appellants. It held, interpreting the constitution and laws of the State, that the appropriation and disposition of water was a public use, the right to collect tolls or compensation for it a franchise, subject to regulation and control in the manner prescribed by law, and that such tolls and compensation could not be fixed by the contract of the parties.

If the contention of the appellee is justified, that the contracts between it and the appellants gave it the right to establish the rates, the controversy is narrowed and simplified, and we are relieved from deciding the many interesting and difficult questions pressed by appellants for judgment.

There was some difference in the way the water rights of the defendants arose, but they are assimilated in the same legal right by the allegation in the original answer, that the company did "not make or claim any distinction in respect of the character and quality of the water right, or of the annual rates actually established or collected for irrigation."

It is only necessary, therefore, to say in description that some of the lands were purchased before 1892, and up to that date there was no express or separate grant of "water rights." Some were purchased after 1892, and as to them there was a specific sale of the appurtenant water right. The contracts in both cases contained an agreement to sell certain described real estate, "together with a water right to one acre foot of water per annum for each and every of said above described real estate, to be delivered by the party of the first part through its pipes and flumes at a point — said water to be used exclusively on said real estate, and not to be diverted therefrom. Provided, that the party of the first part may change the place of delivery of said water, so long as the same is near the highest point of said land. For which land and water right the party of the second part agrees to pay the sum of — dollars."

The contracts also contained the following provisions:

"And the party of the second part further agrees and binds

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—self, — heirs, executors and assigns to pay the regular annual water rates allowed by law and charged by the party of the first part for water covered by said water rights, whether such water is used or not, and to pay for all water used on said land for domestic purposes, monthly, under such rules and regulations for the delivery of water to consumers, as the party of the first part may from time to time make."

Other lands (about nine hundred acres) described in the answer as "lying outside of National City" were derived, not from the company, but water rights were attached to them on the same basis as to the lands sold by the company up to 1892. After that date the company refused to furnish water, except upon the payment of a sum in gross for the water right over and above the uniform annual rate established and collected, or in lieu thereof six per cent annual interest upon the company's estimate of the value of such right. The price was first fixed at fifty dollars, afterwards at one hundred dollars, and the contract in addition providing for the sale of the water right contained the following provision:

"In consideration of the foregoing stipulations and agreements, the party of the second part agrees and binds — self, — heirs, executors and assigns, to pay the sums above specified promptly as the sums, and each of them, falls due, and that — will in all things comply with and perform the terms and conditions of this agreement on — part to be performed, and that, — and they will promptly pay all annual water rates and charges for the water to which — is entitled under and by virtue of this agreement, at rates fixed by the party of the first part as allowed by law, and at the times, in the manner, and according to the rules and regulations made and adopted by the party of the first part, the annual rental for the amount of water to which the party of the second part is entitled under this contract, to be paid whether the same is used or not, and also to pay for all water used by — on said land for domestic purposes at the rates fixed by the party of the first part and allowed by law."

Under the same form of contract water rights were attached to about four hundred acres of lands belonging to other defendants.

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To lands which lay in what is designated Ex-Mission the contracts contained the following provision:

"The parties of the first part will make application for the use of the water upon the form provided by the party of the second part for that purpose, and pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National Ranch, and subject to the same general rules and regulations."

J. M. Ballow, one of the defendants, claimed his water right under a contract, which provided as follows:

"Provided, that said party of the second part shall make application in the form provided by the company, for the use of the water, and use the same under the same restrictions and conditions, and to pay said party of the first part the current rate therefor, as established, for Chula Vista; provided, said restrictions and conditions are not inconsistent with the water right hereby granted to said party of the second part."

The rates in Chula Vista were governed by the general contract.

It is apparent that the contracts in all things substantial to the controversy are similar. They provide for the payment of a certain sum for land and water rights, or for water rights alone, and all for the payment of annual rates besides. And provide directly or by reference that the annual rates shall "be fixed by the party of the first part, (the company,) as allowed by law," to be paid whether the water is used or not. Water used for domestic purposes is also to be paid for "at the rates fixed by the party of the first part and allowed by law."

These provisions do not leave much room for construction. For irrigation purposes and for domestic purposes the rental of water is to be paid at rates "fixed" by the company. The only qualification is "as allowed by law." What this means we shall presently consider; but whatever it means, it does not sustain appellant's contention that the rate of $3.50 per acre per annum was irrevocable, secured to them free from the power of variation by the company or by law. It is not important to consider, therefore, whether, under the constitution and laws of the State, they could contract with the company for the price

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of a water right. If the contract, they plead, gives to the company the power to fix the annual rate, the only inquiry which need be, is whether the power has been exercised "as allowed by law." What this means can be the only controversy.

The appellee concedes the power of the regulation of rates by the board of supervisors, but claims that until the power is exercised the right to fix the rates rests with it, and that those fixed by it are "allowed by law." The appellants contend that the power of the board of supervisors is only a power to fix maximum rates, and below them the right of the parties to contract is unrestrained, (a view sufficiently discussed already,) and that until the board shall act "the statute itself fixes the standard of maximum rates, as being the 'actual rates established and collected by the corporation,' and forbids the corporation to exceed such maximum."

The contention is claimed to be based on section 5 and section 8 of the act of 1885. Section 5 vests the power to fix rates in the board of supervisors, and provides "when so fixed by such board shall be binding and conclusive for not less than one year next after their establishment, and until established anew or abrogated by such board of supervisors as hereinafter provided." And then follows the provision upon which appellants especially rely:

"And until such rates shall be so established, or after they shall have been abrogated by such board of supervisors, as in this act provided, the actual rates established and collected by each of the persons, companies, associations and corporations now furnishing, or that shall hereinafter furnish, appropriated waters for sale, rental or distribution to the inhabitants of any of the counties of this State, shall be deemed and accepted as the legally established rates thereof."

Section 8 provides that those furnishing water "shall so sell, rent or distribute such waters at rates not exceeding the established rates fixed and regulated therefor by the boards of supervisors of such counties, or as fixed and established by such person, company or association, or corporation, as provided in this act."

The deduction which appellants make is that when the com-

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pany once fixes the rates they must remain so fixed, and if changed by supervisorial action recur upon the cessation of that action—inevitable always through every change of condition; if excessive, to forever remain so; if deficient, to forever remain so.

The argument urged to support this is that one of the ordinary meanings of the word "actual" is "existing at the time." "And if" (to quote counsel) "the lexicographer be consulted to define the word establish he will give its meaning substantially, as does the Century Dictionary, to be 'to make stable; firm or sure; appoint; ordain; settle or fix unalterably.'" To illustrate the immutability which one of its senses convey, counsel quote with apologetic reverence an illustration, which they say is often found in standard dictionaries: "I will establish my covenant with him for an everlasting covenant." Gen. xvii: 19.

We are not impressed with the aptness of the illustration to the case at bar.

Covenants formed and promulgated by a divine wisdom and foresight can have the attribute of immutability, and their language may be used and interpreted to express it. Human regulations are for the most part occasional and temporary. Besides, one definition of a word does not express its whole meaning or necessarily determine the intention of its use. If so, interpretation would not be difficult, and the application of the language of a law or contract would be as unerring as easy.

"Actual," of course, means existent, but it does not preclude change. Nor does the word "establish" convey the idea of permanency. As used in the statute, it has no such meaning. The power of the board of supervisors is not exhausted by one exercise, nor has its result unalterable fixity. It is beyond change only for a year. The language of the statute is "at any time after the establishment of such water rates by any board of supervisors of this State the same may be established anew or abrogated in whole or in part by such board, to take effect at not less than one year next after such first establishment. . . ."

It is manifest to construe the word "establish" to mean "to

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fix unalterably," would throw the powers of the board of supervisors into confusion and contradiction.

To say that the rates are unalterable for a year would prove nothing. Such effect comes, not from the use of the word "establish," but from other words, and, but for them, rates established might "be established anew," as often as the board of supervisors might choose. Nor can it be said that the word means one thing when applied to the power of the board of supervisors, and another thing when applied to the power of the company. To say so is to abandon the argument. That depends upon the meaning of the word "establish" to be "to fix unalterably"—to mean of itself, and in its use, permanence and unchangeability. If it does not mean that of itself, there is an end of the argument, for there is nothing in the act or its purpose which would give it such meaning when expressing the power of the company, and something else when expressing the power of the board of supervisors. The purpose of the act rejects such view. Its purpose is regulation, deliberate and judicial and periodical regulation by a selected tribunal, and we cannot believe that the legislature intends by an absolute and peremptory provision to fix rates upon the water companies unalterable by them, no matter what change in conditions might supervene. Against rates which may become unreasonably high, the statute gives relief to consumers through petition to the board of supervisors. Rates which may become unreasonably low, it surely does not intend to impose on the companies forever, except as relief may come from the voluntary justice of its customers or by a violation of the statute and appeal to the courts. There is nothing in the act to indicate such purpose, nor does it need to have such purpose. Its dominant idea is the regulation of rates by law, not commanded to be exercised by the governing bodies as a voluntary duty as establishing rates in cities and towns, but exercised when invoked by petition. Until the necessity of that, what more natural and just than to leave the right with the water companies and recognize it as legal. This is the meaning, we think, of the provisions of sections 5 and 8, *supra*. To so interpret them makes the scheme of regulation complete—adequate, without being meddlesome or

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oppressive. The power of regulation is asserted and provided for, and ready to be exercised to correct abuse, and who doubts but that its exercise would be invoked.

The appellants assign many errors upon the action of the Circuit Court in sustaining the exceptions to the answer made in the original suit. It would extend the opinion to too great length to consider them separately. They are reduced to and depend upon the claim that they constituted a submission of the case on bill and answer, and if the latter traversed any material allegation of the bill it could not be taken *pro confesso*, and a decree entered upon it would be erroneous. *In re Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247.

The application of the principle is claimed upon the ground that the answer denies that the rate of $3.50 per acre per annum is unreasonable or that the increased rate of $7.00 per acre is reasonable.

The Circuit Court held that issue was not open to its decision. It said that if the rates established by the board of supervisors were unreasonable they could only be annulled. In no case would the court fix them. "Therefore," it was further said, "it is not for the court in the present case to go into the question of reasonableness of the rates established by the complainant, and which it seeks to enforce. If unreasonable, and the consumers are for that reason dissatisfied therewith, resort must first be had to the body designated by the law to fix proper rates, to wit, the board of supervisors of San Diego County."

We concur in this view, and finding no error in the decree it is

Affirmed.

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KNOWLTON v. MOORE.[1]

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

No. 387. Argued December 5, 6, 7, 1899. — Decided May 14, 1900.

The plaintiffs in error were the executors of the will of Edwin F. Knowlton, of Brooklyn, New York. The defendant in error was the United States Collector of Internal Revenue for the First Collection District for the State of New York. Mr. Knowlton died at Brooklyn in October, 1898, and his will was duly proved. Under the portion of the act of Congress of June 13, 1898, which is printed at length in a note to the opinion of the court in this case, the United States Collector of Internal Revenue demanded of the executors a return, showing the amount of the personal estate of the deceased, and the legatees and distributees thereof. This return the executors made under protest, asserting that the act of June 13 was unconstitutional. This return showed that the personal estate amounted to over two and a half millions of dollars, and that there were several legacies, ranging from under $10,000 each to over $1,500,000. The collector levied the tax on the legacies and distributive shares, but for the purpose of fixing the rate of the tax considered the whole of the personal estate of the deceased as fixing the rate for each, and not the amount coming to each individual legatee under the will. As the rates under the statute were progressive from a low rate on legacies amounting to $10,000, to a high rate on those exceeding $1,000,000, this decision greatly increased the aggregate amount of the taxation. The executors protested on the grounds, (1) that the provisions of the act were unconstitutional; (2) that legacies amounting to less than $10,000, were not subject to any tax or duty; (3) that a legacy of $100,000, taxed at the rate of $2.25 per $100, was only subject to the rate of $1.12½. Demand having been made by the collector for payment, payment was made under protest; and, after the Commissioner of Internal Revenue had refused to refund any of it, the executors commenced suit to recover the amount so paid. The Circuit Court sustained a demurrer upon the ground that no cause of action was alleged, and dismissed the suit, which was then brought here by writ of error. *Held:*

(1) That the statute clearly imposes the duty on the particular legacies or distributive shares, and not on the whole personal estate;

[1] The docket title of this case is Eben J. Knowlton and Thomas A. Buffum, executors of the last will and testament of Edwin F. Knowlton, deceased, plaintiffs in error, v. Frank B. Moore, United States Collector of Internal Revenue, First Collection District, State of New York.

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Counsel for Parties.

(2) That it makes the rate of the tax depend upon the character of the links connecting those taking with the deceased, being primarily determined by the classifications, and progressively increased according to the amount of the legacies or shares;

(3) That the court below erred in denying all relief, and that it should have held the plaintiffs entitled to recover so much of the tax as resulted from taxing legacies not exceeding ten thousand dollars, and from increasing the tax rate with reference to the whole amount of the personal estate of the deceased from which the legacies or distributive shares were derived.

Death duties were established by the Roman and ancient law, and by the modern laws of France, Germany and other continental countries, England and her colonies, and an examination of all shows that tax laws of this nature rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit or the transmission from the dead to the living on which such taxes are more immediately vested.

When a particular construction of a statute will occasion great inconvenience, or produce inequality and injustice, that view is not to be favored if another and more reasonable interpretation is present in the statute.

The provision in section 8 of article I of the Constitution that "all duties, imports and excises shall be uniform throughout the United States," refers purely to a geographical uniformity, and is synonymous with the expression "to operate generally throughout the United States."

The statute considered in this case embraces the District of Columbia.

THE case is stated in the opinion of the court.

Mr. John G. Carlisle, *Mr. Wheeler H. Peckham* and *Mr. Charles H. Otis* for plaintiffs in error. *Mr. Peter B. Olney*, *Mr. William Edmond Curtis*, *Mr. Henry M. Ward*, *Mr. Ward B. Chamberlin*, *Mr. George F. Chamberlin*, *Mr. Julien T. Davies*, *Mr. Frederic R. Coudert, Jr.*, *Mr. E. S. Mansfield* and *Mr. W. S. V. Hopkins* were on Mr. Carlisle's brief. *Mr. Thomas B. Reed*, *Mr. Thomas Thacher* and *Mr. Charles H. Otis* filed briefs for plaintiffs in error.

Mr. Solicitor General for defendants in error.

Mr. John G. Carlisle and *Mr. Henry M. Ward* filed an additional brief, and *Mr. Wheeler H. Peckham*, *Mr. Peter B. Olney* and *Mr. William Edmond Curtis* were on this brief, and

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Mr. Thomas B. Reed and *Mr. Thomas Thacher* for plaintiffs in error filed a brief in response to the suggestion of the court by its order of February 26, 1900, etc. *Mr. Solicitor General* filed a supplemental brief in response to the suggestion of the court.

MR. JUSTICE WHITE delivered the opinion of the court.

The act of Congress of June 13, 1898, c. 448, which is usually spoken of as the War Revenue Act, (20 Stat. 448,) imposes various stamp duties and other taxes. Sections 29 and 30 of the statute, which are therein prefaced by the heading "Legacies and Distributive Shares of Personal Property," provide for the assessment and collection of the particular taxes which are described in the sections in question. To determine the issues which arise on this record it is necessary to decide whether the taxes imposed are void because repugnant to the Constitution of the United States, and if they be valid, to ascertain and define their true import.

The controversy was thus engendered: Edwin F. Knowlton died in October, 1898, in the borough of Brooklyn, State of New York, where he was domiciled. His will was probated, and the executors named therein were duly qualified. As a preliminary to the assessment of the taxes imposed by the provisions of the statute, the collector of internal revenue demanded of the executors that they make a return showing the amount of the personal estate of the deceased, and disclosing the legatees and distributees thereof. The executors, asserting that they were not obliged to make the return because of the unconstitutionality of sections 29 and 30 of the statute, nevertheless complied, under protest. The report disclosed that the personal estate was appraised at $2,624,029.63, and afforded full information as to those entitled to take the same. The amount of the tax assessed was the sum of $42,084.67. This was reached according to the computation shown in the table which is printed on the following page.

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Opinion of the Court.

Names of persons entitled to beneficial interest in said property.	Relationship of beneficiary to persons who died possessed.	Clear value of legacy.	Amount taxable.	Rate for every $100.	Amount of tax.
Mary, Countess von Francken Sierstorpff	Daughter				
Furniture					
Cash legacy					
Income for life on residuary estate, amounting to $2,348,734.67. Countess Sierstorpff became 28 years of age on July 2, 1898. Present value of her life interest in said residuary estate, estimated according to United States tables is		$1,731,996.35	$1,731,996.35	2.25	38,969.92
Total					
George W. Knowlton	Brother	100.00	100.00	2.25	2.25
Charlotte A. Batchelor	Sister	5,000.00	5,000.00	2.25	112.50
Eben J. Knowlton	Brother	100,000.00	100,000.00	2.25	2,250.00
Unitarian Church of West Upton, Mass.	None	5,000.00	5,000.00	15.	750.00
The remainder of said residuary estate is subject to contingencies, and the individuals who will ultimately become entitled to the same on their degree of relationship to the testator cannot be determined until after the termination of two lives now in being. The present value of the said remainder of said residuary estate, estimated as aforesaid, is $717,803.30		717,803.30			
Total		$2,559,899.65	$1,842,096.35		42,084.67

It is apparent, from the table, that the collector, whilst levying the tax on the legacies and distributive shares, or the right to receive the same, yet, for the purpose of fixing the rate of the tax, took into view the whole of the personal estate of the deceased. That is, whilst the tax was laid upon the legacies, the rate thereof was fixed by a separate and distinct right or thing, the entire personal estate of the deceased. The executors protested against the entire tax, and also as to the method by which it was assessed. The grounds of the protest were as follows:

"1. The provisions of the act of Congress under which it is sought to impose, assess and collect the said tax or duty are in

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violation of the provisions of article I, sections 8 and 9, of the Constitution of the United States, and are therefore void.

"2. The legacies to George W. Knowlton, Charlotte A. Batchelor, the Unitarian Church of West Upton, Mass., each amount to less than $10,000, and are not subject to any tax or duty under the said provisions of the said act of Congress, even if such provisions be not unconstitutional and void.

"3. The legacy to Eben J. Knowlton, a brother of the testator, amounts to only $100,000, and under the said provisions of the said act should be taxed at the rate of $1.12½ per $100, and not at the rate of $2.25 per $100, even if said act be not unconstitutional and void."

Demand having been made by the collector for the payment, accompanied with a threat to distrain in case of refusal, the tax was paid under written protest, which repeated the grounds above stated. In the receipt given it was recited that the tax had been paid under protest to avoid the use of compulsory process. A petition for refunding was subsequently presented, by the executors, in which the grounds of the protest were reiterated. The Commissioner of Internal Revenue having made an adverse ruling, the present suit was commenced to recover the amount paid. The facts as to the assessment and collection of the taxes were averred, and the refusal of the internal revenue commissioner to refund was alleged. The petition for refunding was made a part of the pleadings. The right to repayment was based upon the averment that the sections of the statute, under authority of which the amount had been assessed and collected, were unconstitutional. The Circuit Court sustained a demurrer, on the ground that no cause of action was alleged. The claim was rejected, and the suit was dismissed with costs.

The questions which arise on this writ of error, to review the judgment of the Circuit Court, are fourfold: First, that the taxes should have been refunded because they were direct taxes, and not being apportioned were hence repugnant to article 1, section 8, of the Constitution of the United States; second, if the taxes were not direct, they were levied on rights created solely by state law, depending for their continued existence on the consent of the several States, a volition which Congress

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has no power to control, and as to which it could not, therefore, exercise its taxing authority; third, if the taxes were not direct, and were not assessed upon objects or rights which were beyond the reach of Congress, nevertheless the taxes were void, because they were not uniform throughout the United States, as required by article 1, section 9, of the Constitution of the United States; fourth, because, although the taxes be held to have been in all respects constitutional, nevertheless they were illegal, since in their assessment the rate of the tax was determined by the aggregate amount of the personal estate of the deceased, and not by the sum of the legacies or distributive shares, or the right to take the same, which were the objects upon which by law the taxes were placed.

Although it may be, in the abstract, an analysis of these questions, in logical sequence, would require a consideration of the propositions in the order just stated, we shall not do so for the following reasons: The inquiry whether the taxes are direct or indirect must involve the prior determination of the objects or rights upon which by law they are imposed and assessed, since it becomes essential primarily to know what the law assesses and taxes in order to completely learn the nature of the burden. So, also, to solve the contention as to want of uniformity, it is requisite to understand not only the objects or rights which are taxed, but the method ordained by the statute for assessing and collecting. This must be the case, since uniformity, in whatever aspect it be considered, involves knowledge as to the operation of the taxing law, an understanding of which cannot be arrived at without a clear conception of what the law commands to be done. For these reasons we shall first, in a general way, consider upon what rights or objects death duties, as they are termed in England, are imposed. Having, from a review of the history of such taxes, reached a conclusion on this subject, we shall decide whether Congress has power to levy such taxes. This being settled, we shall analyze the particular act under review, for the purpose of ascertaining the precise form of tax for which it provides and the mode of assessment which it directs. These questions being disposed of, we

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shall determine whether the taxes which the act imposes are void, because not apportioned or for the want of uniformity.

It is conceded on all sides that the levy and collection of some form of death duty is provided by the sections of the law in question. Bearing this in mind, the exact form of the tax and the method of its assessment need not be presently defined, since doing so appropriately belongs to the more specific interpretation of the statute to which we shall hereafter direct our attention. Taxes of this general character are universally deemed to relate, not to property *eo nomine*, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy. Such taxes so considered were known to the Roman law and the ancient law of the continent of Europe. Smith's Wealth of Nations, London ed. of 1811, vol. 3, p. 311. Continuing the rule of the ancient French law, at the present day in France inheritance and legacy taxes are enforced, being collectible as stamp duties. They are included officially under the general denomination of indirect taxes, for the reason that all inheritance and legacy taxes are considered as levied on the "occasion of a particular isolated act." This view of the inheritance and legacy tax conforms to the official definition of indirect taxes, among which inheritance and legacy taxes are classed, which prevails in France at the present day. The definition is as follows:

"Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange."

In Germany and other continental countries in various forms death duties are enforced, in the main, by way of stamp duties. They are there, both in theory and in practice, treated as resulting from the occasion of death, and hence as not legally equivalent with taxes levied on property merely because of its

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ownership. Cohn's Science of Finance (Veblen's translation), secs. 282, 283, 350; Dos Passos' Inheritance Tax Law, sec. 1.

The term "Death Duties," by which inheritance and legacy taxes, in whatever form imposed, are described in England, indicates the generic nature of such taxes. In Hanson's Death Duties, p. 1, it is said: "Historically, probate duty is the oldest form of death duty, having been established in 1694." The probate duty thus referred to was a fixed tax dependent on the sum of the personal estate within the jurisdiction of the probate court, payable on the grant of letters of probate by means of stamp duties, and was treated as an expense of administration to be deducted out of the residue of the estate. In 1780 this tax was supplemented by what became known as a legacy tax, at first collected by means of a stamp affixed to the receipt, evidencing the payment of a legacy or share in the personal property of a deceased person. It is unnecessary to consider the change in the mere form of this latter tax. The tax was not deducted as an expense of administration, but was charged and collected upon the passing of the individual legacies or interests upon which it was imposed. In 1853 the probate duty tax and the legacy tax, just referred to, were supplemented by a tax known as the succession duty. This law reached interests in real estate passing or acquired by the death of a person and interests in personal property not covered by the legacy act. This also was not treated as an expense of administration, but was charged upon and collected out of the particular interests subjected to the tax.

The nature of the succession duty is shown by the second section of the act defining the same, which is thus condensed by Hanson at page 40 of his treatise:

"Succession duty is a tax placed on the gratuitous acquisition of property which passes on the death of any person, by means of a transfer (called either a disposition or a devolution) from one person (called the predecessor) to another person (called the successor). Property chargeable with this tax is called a succession."

By the Finance Act of 1894, the probate duty was superseded by what was termed the estate duty. This, like the probate

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duty, was a tax distinct from those imposed by the Legacy and Succession Duty Acts upon the receipt of real or personal property, or an interest therein, although in some administrative features it modified or regulated the subject of a succession duty. This tax is payable out of the general revenue of the estate. *Re Bourne*, (1893) 1 Ch. 188, cited by Hanson at p. 354.

The principle upon which the tax rests is thus stated by Hanson at p. 63:

"The new duty imposed by the Finance Act, and called estate duty, as has been said above, supersedes probate duty; but the key to the construction of the Finance Act lies in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death. Unless this principle is kept clearly in view, the mind is constantly tempted by the wording of the act to revert to principles of succession duty which have no real connection with the subject."

This summary suffices to indicate the origin, the development and the theory underlying death duties. A full analysis thereof will be found in Dowell's History of Taxation, vol. 3, p. 148, *et seq.*; in Hanson's Death Duties; and in the treatise of Dos Passos, section 4, and notes, where the various acts are referred to.

In the colonies of Great Britain death duties, as a general rule, obtain. Some of the statutes are modeled upon those of the mother country, and levy taxes on legacies, etc., passing, measured by their value and on the estate proper. Others, again, have merely the estate tax without the legacy tax. The statutes are reviewed in the appendix to Hanson's treatise, beginning at page 717.

A retrospective study of the death duty laws enacted in our own country, national and state, will show that they rest upon the same fundamental conception which has caused the adoption of like statutes in other countries; and, especially in their national development, do they substantially conform (to the

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extent to which they go) to the evolution of the system in England.

As early as 1797 Congress imposed a legacy tax. Act of July 6, 1797, c. 11, 1 Stat. 527. This act was probably the outgrowth of a recommendation contained in a report of the Committee of Ways and Means, presented in the House on Tuesday, March 17, 1796. Annals of Congress, Fourth Congress, first session, pp. 993, *et seq.* The report recommended, 1, the collection of two millions of dollars by a direct tax; 2, the imposition of "a *duty* of two per centum ad valorem . . . on all testamentary dispositions, descents and successions to the estates of intestates, excepting those to parents, husbands, wives or lineal descendants;" 3, the imposition of various stamp duties; and, 4, an increase of the duty on carriages. The act of 1797 continued in force until June 30, 1802. 2 Stat. 148, c. 17. In this act, as in the English legacy duty statute of 1780 and supplementary statutes, the mode of collection provided was by stamp duties laid on the receipts evidencing the payment of the legacies or distributive shares in personal property, and the amount was, like the English legacy tax, charged upon the legacies and not upon the residue of the personal estate. The text of the statute is printed in the margin.[1]

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[1] Chapter XI, July 6, 1797.

"SECTION 1. *Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled*, That from and after the thirty-first day of December next, there shall be levied, collected and paid throughout the United States, the several stamp duties following, to wit: For every skin or piece of vellum, or parchment, or sheet or piece of paper upon which shall be written or printed any or either of the instruments or writings following, to wit: . . . any receipt or other discharge for or on account of any legacy left by any will or other testamentary instrument, or for any share or part of a personal estate divided by force of any statute of distributions, the amount whereof shall be above the value of fifty dollars, and shall not exceed the value of one hundred dollars, twenty-five cents; where the amount thereof shall exceed the value of one hundred dollars and shall not exceed five hundred dollars, fifty cents; and for every further sum of five hundred dollars, the additional sum of one dollar. . . . *Provided*, That nothing in this act contained shall extend to charge with a duty any legacy left by any will or other testamentary instrument, or any share or part of a personal estate, to be divided by

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In sections 111 and 112 of chapter 119, act of July 1, 1862, 12 Stat. 433, 485, a legacy tax was again enacted. Like in character to the act of 1797, this was a tax imposed on legacies or distributive shares of personal property. But in the same chapter was contained still another form of death duty. By section 194 a probate duty, proportioned to the amount of the estate and to be paid by way of stamps, was levied. The result of the act of 1862, therefore, was to cause the death duties imposed by Congress to greatly resemble those then existing in England; that is, first, a legacy tax, chargeable against each legacy or distributive share, and a probate duty chargeable against the mass of the estate. The only difference between the system created by the act of 1862 and that existing in England was that the act of 1862 did not embody the succession tax provided for in England, by which interests in real estate passing by death were subjected to a duty. A detailed reference to the provisions of the act of 1862 need not be made, because we shall have occasion to do so in considering the legislation which, in 1864, in effect reënacted, although largely increasing the rates, both the probate duty or tax on the whole estate and the legacy tax on each particular legacy or distributive share. The act of 1864, however, added, in separate sections, a duty on the passing of real estate, in substantial harmony with the principle of the succession tax expressed in the English Succession Duty Act. Thus it came to pass that the system of death duties prevailing in England and that adopted by Congress — leaving out of view the differences in rates and the administrative provisions — were substantially identical, and of a threefold nature, that is, a probate duty charged upon the whole estate, a legacy duty charged upon each legacy or distributive share of personalty, and a succession duty charged against each interest in real property. The act of 1864 was amended in several particulars by the act of July 13, 1866. 14 Stat. 140. These amend-

force of any statute of distributions which shall be left to, or divided amongst, the wife, children, or grandchildren of the person deceased intestate, or making such will or testamentary instrument, or any recognizance, bill, bond, or other obligation or contract, which shall be made to or with the United States, or any State, or for their use respectively."

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ments, however, did not materially modify the system of taxation provided in the act of 1864.

Whilst the general plan of the act of 1864 shows that its framers had in mind the English law, this fact was conclusively demonstrated by section 127, wherein the succession or real estate inheritance tax was defined in substantially similar terms to that contained in the English Succession Duty Act. The identity of the conception embodied in the act of 1864 with that existing in England was observed by this court in *Scholey* v. *Rew*, 23 Wall. 331, where, in holding that the subject matter of the assessment of a succession tax was the devolution of the estate or the right to become beneficially entitled to the same, etc., the court said (p. 349):

"Decided support to the proposition that such is the true theory of the act is derived from the fact that the act of Parliament from which the particular provision under discussion was largely borrowed has received substantially the same construction."

In the statute of August 27, 1894, 28 Stat. 509, c. 349, what was in effect a legacy tax was imposed by the provisions of section 28. Ib. 553. The tax was *eo nomine* an income tax, but was in one respect the legal equivalent of a legacy tax, since among the items going to make up the annual income which was taxed was "money and the value of all personal property acquired by gift or inheritance." This law was not enforced. Its constitutionality was assailed on the ground that the income tax, in so far as it included the income from real estate and personal property, was a direct tax within the meaning of the Constitution, and was void because it had not been apportioned. The contention was twice considered by this court. On the first hearing, in *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 429, it was decided that, to the extent that the income taxes included the rentals from real estate, the tax was a direct tax on the real estate, and was therefore unconstitutional, because not apportioned. Upon the question of whether the unconstitutionality of the tax on income from real estate rendered it legally impossible to enforce all the other taxes provided by the statute, the court was equally divided in opinion.

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Ib. 586. On a rehearing (158 U. S. 601) the previous opinion was adhered to, and it was moreover decided that the tax on income from personal property was likewise direct, and that the law imposing such tax was therefore void because not providing for apportionment. The court said (p. 637):

"*Third.* The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid."

The decision, that the invalidity of the income tax, in the particulars quoted, carried with it the other and different taxes which were included in income, was not predicated upon the unconstitutionality of such other taxes, but solely upon the conclusion that by the statute there was such an inseparable union between the elements of income derived from the revenues of real estate and personal property and the other constituents of income provided in the statute, that they could not be divided. The court said (p. 637):

"We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments and vocations. But this is not such an act, and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive, of the act, which became a law without the signature of the President on August 28, 1894, are wholly inoperative and void."

An inheritance and legacy tax imposed by one of the States (Louisiana) was considered in *Mager* v. *Grima*, 8 How. 490. The opinion of the court, delivered by Mr. Chief Justice Taney, upheld the right to levy such taxes. The same subject was passed on in *United States* v. *Perkins*, 163 U. S. 625. The

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question was whether property bequeathed to the United States could be lawfully included in a succession tax. It was decided that it could be. In the opinion, delivered by Mr. Justice Brown, it was said (p. 628):

"The tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee."

Again (p. 629):

"That the tax is not a tax upon the property itself, but upon its transmission by will or descent, is also held, both in New York and in several other States."

Yet again (p. 630):

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is upon the legacy before it reaches the hands of the Government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

Once more, quite recently, the subject was considered in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283. The issue for decision was this: A law of the State of Illinois imposed a legacy and inheritance tax, the rate progressing by the amount of the beneficial interest acquired. This progression of rates was assailed in the courts of Illinois as being in violation of the constitution of that State, requiring equal and uniform taxation. The state court having decided that the progressive feature did not violate the constitution of the State, the case came to this court upon the contention that the establishment of a progressive rate was a denial both of due process of law and of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution. These complaints were held to be untenable. In the course of its opinion the court, speaking through Mr. Justice McKenna, after briefly adverting to the history of inheritance and legacy taxes

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in other countries, referred to their adoption in many of the States of the Union as follows (pp. 287–288):

"In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Virginia, 1887, and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, 1891; Tennessee in 1891, chapter 25, now repealed by chapter 174, Acts, 1893. They were adopted in North Carolina in 1846, but repealed in 1883. Were enacted in Virginia in 1844, repealed in 1855, reënacted in 1863, and repealed in 1884. Other States have also enacted them—Minnesota by constitutional provision.

"The constitutionality of the taxes have been declared, and the principles upon which they are based explained in *United States* v. *Perkins*, 163 U. S. 625, 628; *Strode* v. *Commonwealth*, 52 Penn. St. 181; *Eyre* v. *Jacob*, 14 Grat. 422; *Schoolfield* v. *Lynchburg*, 78 Virginia, 366; *State* v. *Dalrymple*, 70 Maryland, 294; *Clapp* v. *Mason*, 94 U. S. 589; *In re Merriam's Estate*, 141 N. Y. 479; *State* v. *Hamlin*, 86 Maine, 495; *State* v. *Alston*, 94 Tennessee, 674; *In re Wilmerding*, 117 California, 281; Dos Passos Collateral Inheritance Tax, 20; *Minot* v. *Winthrop*, 162 Mass. 113; *Gelsthorpe* v. *Furnell*, (Montana) 51 Pac. Rep. 267. See also *Scholey* v. *Rew*, 23 Wall. 331.

"It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them, that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of

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her colonies where such laws have been enacted, in the legislation of the United States and the several States of the Union, the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested.

Having ascertained the nature of death duties, the first question which arises is this: Can the Congress of the United States levy a tax of that character? The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore the levy by Congress of a tax on inheritances or legacies, in any form, is beyond the power of Congress, and is an interference by the National Government with a matter which falls alone within the reach of state legislation. It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the government. The act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the convention, which framed the Constitution, must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of Congress because exclusively within state authority.

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It is, moreover, worthy of remark that similar taxes have at other periods and for a considerable time been enforced; and, although their constitutionalty was assailed on other grounds held unsound by this court, the question of the want of authority of Congress to levy a tax on inheritances and legacies was never urged against the acts in question. Whilst these considerations are of great weight, let us for the moment put them aside to consider the reasoning upon which the proposition denying the power in Congress to impose death duties must rest.

Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties. The qualification of such taxes as privilege taxes, or describing them as levied on a privilege, may also produce misconception, unless the import of these words be accurately understood. They have been used where the power of a state government to levy a particular form of inheritance or legacy tax has in some instances been assailed because of a constitutional limitation on the taxing power. Under these circumstances, the question has arisen whether, because of the power of the State to regulate the transmission of property by death, there did not therefore exist a less trammeled right to tax inheritances and legacies than obtained as to other subject-matters of taxation, and, upon the affirmative view being adopted, a tax upon inheritances or legacies for this reason has been spoken of as privilege taxation, or a tax on privileges. The conception, then, as to the privilege, whilst conceding fully that the occasion of the transmission or receipt of property by death is a usual subject of the taxing power, yet maintains that a wider discretion or privilege is vested in the States, because of the right to regulate. Courts which maintain this view have therefore treated death duties as disenthralled from limitations which would otherwise apply, if the privilege of regulation did not exist. The authorities which maintain this doctrine have been already referred to in the citation which we have made from *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 288. An illustration is found in

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United States v. *Perkins*, 163 U. S. 625, where the right of the State of New York to levy a tax on a legacy bequeathed to the Government of the United States was in part rested on the privilege enjoyed by the State of New York to regulate successions. Some state courts, on the other hand, have held that, despite the power of regulation, no greater privilege of taxation exists as to inheritance and legacy taxes than as to other property. *Cope's Appeal*, 191 Penn. St. 1; *State* v. *Ferris*, 53 Ohio St. 314; *State* v. *Gorman*, 40 Minn. 232; *Curry* v. *Spencer*, 61 N. H. 624. In *State* v. *Switzler*, 143 Missouri, 287, the power of the legislature of Missouri to levy a uniform tax upon the succession of estates was conceded, though such tax was declared not to be a tax upon property in the ordinary sense. The court nevertheless held that the particular tax in question, which was progressive in rate, was invalid, because it violated a provision of the state constitution; the decision, in effect, being that because the legislature had the power to regulate successions, it was not thereby justified in levying a tax which was not sanctioned by the state constitution.

All courts and all governments, however, as we have already shown, conceive that the transmission of property occasioned by death, although differing from the tax on property as such, is, nevertheless, a usual subject of taxation. Of course, in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the States and not in Congress.

It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual objects of taxation. Indeed, as said in the *License Tax Cases*, 5 Wall. 462, 471, after referring to the limitations expressed in the Constitution, "Thus limited, and thus only, it (the taxing power of Congress) reaches every subject, and may be exercised at discretion." The limitation which would exclude from Congress the right to tax inheritances and legacies is made to depend upon the contention that as the power to regulate successions is lodged solely in the several States, therefore Congress is without authority to tax the transmission or

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receipt of property by death. This proposition is supported by a reference to decisions holding that the several States cannot tax or otherwise impose burdens on the exclusive powers of the National government or the instrumentalities employed to carry such powers into execution, and, conversely, that the same limitation rests upon the National government in relation to the powers of the several States. *Weston* v. *Charleston*, 2 Pet. 449; *McCulloch* v. *Maryland*, 4 Wheat. 316, 431, 439; *Bank of Commerce* v. *New York City*, 2 Black, 620; *Collector* v. *Day*, 11 Wall. 113, 124; *United States* v. *Railroad Co.*, 17 Wall. 322, 327; *Railroad Co.* v. *Peniston*, 18 Wall. 5.

But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts

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which arise from its ownership, are subject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and state governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 431, "that the power to tax involves the power to destroy." This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied. Under our constitutional system both the National and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established. The contention was adversely decided in the *License Tax Cases*,

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supra, where (p. 470) the court said: "We come now to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It was argued, for the defendants in error, that a license to carry on a particular business gives no authority to carry it on; that the dealings in controversy were parcel of the internal trade of the State in which the defendants resided; that the internal trade of a State is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under acts of Congress, must, therefore, be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed." The court, after thus stating the argument, decided that the license was a mere form of excise taxation; that it conferred no right to carry on the business (the selling of lottery tickets and the liquor traffic) if forbidden to be engaged in by the State, but license was applicable whenever under the state law such business was permitted to be done. Many other opinions of this court have pointed out the error in the proposition relied on, and render it unnecessary to do more than refer to them. *Lane County* v. *Oregon*, 7 Wall. 71, 77; *Veazie Bank* v. *Fenno*, 8 Wall. 533, 547; *National Bank* v. *Commonwealth*, 9 Wall. 353, 362; *Collector* v. *Day*, 11 Wall. 113, 127; *United States* v. *Railroad Company*, 17 Wall. 322, 327; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 36; *California* v. *Central Pacific Railroad Co.*, 127 U. S. 1, 40.

We are then brought to a consideration of the particular form of death duty, which is manifested by the statute under consideration. The sections embodying it are printed in the margin.[1]

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[1] Act of June 13, 1898, ch. 448.

SEC. 29. That any person or persons having in charge or trust as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of $10,000 in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale

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It is at the outset obvious that the exact meaning of the statute is not free from perplexity, as there are clauses in it, when looked at apart from their context, which may give rise to conflicting views. It is plain, however, that the statute must mean one of three things:

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or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States as follows, that is to say: Where the whole amount of said personal property shall exceed in value $10,000, and shall not exceed in value the sum of $25,000, the tax shall be—

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister to the person who died possessed of such property as aforesaid, at the rate of seventy-five cents for each and every $100 of the clear value of such interest in such property.

Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed as aforesaid, at the rate of one dollar and fifty cents for each and every $100 of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the persons so died possessed as aforesaid, at the rate of three dollars for each and every one hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than as hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: *Provided*, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person who died possessed as aforesaid, shall be exempt from tax or duty.

Where the amount or value of said property shall exceed the sum of $25,000, but shall not exceed the sum or value of $100,000, the rates of duty or tax above set forth shall be multiplied by one and one half, and where the amount or value of said property shall exceed the sum of $100,000, but

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1. The tax which it imposes is on the passing of the whole amount of the personal estate, with a progressive rate depending upon the sum of the whole personal estate; or,

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shall not exceed the sum of $500,000, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of $500,000 but shall not exceed the sum of $1,000,000, such rates of duty shall be multiplied by two and one half; and where the amount or value of said property shall exceed the sum of $1,000,000, such rates of duty shall be multiplied by three.

SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay, to the collector or deputy collector of the district of which the deceased person was a resident, the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued or shall accrue thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator or trustee to be credited and allowed such payment by every tribunal which, by laws of any State or Territory, is or may be empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list or statement of such legacies, property or personal estate under oath as aforesaid, or shall neglect or refuse to deliver the schedule, list or statement of such legacies, property or personal estate under oath as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property or personal estate, or give the names and relationship of

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2. The tax which it levies is placed on the passing of legacies or distributive shares of personal property at a progressive rate, the amount of such rate being determined, not by the separate sum of each legacy or distributive share, but by the volume of the whole personal estate. This is the mode in which the tax was computed by the assessor, and which was sustained by the court below; or,

3. The tax is on the passing of legacies or distributive shares

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the persons entitled to beneficial interest therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge or custody any record, file or paper containing, or supposed to contain, any information concerning such property or personal estate as aforesaid, passing from any person who may die as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge or custody any such records, files or papers, shall refuse or neglect to exhibit the same on request as aforesaid, he shall forfeit and pay the sum of $500: *Provided*, That in all legal controversies where such deed or title shall be the subject of judicial investigation, the recital in said deed shall be *prima facie* evidence of its truth, and that the requirements of the law had been complied with by the officers of the government.

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of personalty, with a progressive rate on each, separately determined by the sum of each of such legacies or distributive shares.

On the very threshold, the theory that the tax is not on particular legacies or distributive shares passing upon a death, but is on the whole amount of the personal property of the deceased, is rebutted by the heading, which describes what is taxed, not as the estates of deceased persons, but as "legacies and distributive shares of personal property." This, whilst not conclusive, is proper to be considered in interpreting the statute, when ambiguity exists and a literal interpretation will work out wrong or injury. *United States* v. *Fisher*, 2 Cranch, 358, 386; *United States* v. *Palmer*, 3 Wheat. 610, 631; *United States* v. *Union Pacific Railroad*, 91 U. S. 72; *Smythe* v. *Fiske*, 23 Wall. 374, 380; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550.

The opening words of section 29 may, for clearness, be thus arranged:

"That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, . . . passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, . . . shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows: that is to say," etc.

Thus collocated, the statute clearly imposes the duty on the particular legacies or distributive shares, and not on the whole personal estate. It does not say that the tax is levied on the personal estate left by the deceased person, but it is imposed on legacies or distributive shares arising from such property. This is made clearer by considering that in the very same section the tax is described as being upon "any interest which may have been transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons," etc. That is to say, whilst the law places the duty on any legacy or distributive share passing by death, it puts a like

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burden on gifts which may have been made in contemplation of death and otherwise than by last will and testament.

Following the paragraph from which the foregoing has been quoted, the statute makes five distinct classes or enumerations, whereby the rate of the tax is varied, that is, it is made more or less, depending upon the relationship, or want of relationship, of the legatee or distributee to the deceased. But this enumeration can only be explained upon the hypothesis that the law intended to impose a greater or less tax upon a legatee or distributee, arising from his degree of relationship or his being a stranger in blood to the deceased. Thus it cannot be doubted that, in assessing the tax, the position of each separate legatee or distributee must be taken into view in order to ascertain the primary rate which the statute establishes. One of two things must arise. When the rate of tax is thus calculated upon the particular attitude to the deceased of each of the legatees or distributees, the sum of the tax must be deducted either from each particular legacy or from the mass of the whole personal estate. If it is deducted from each particular legacy, then it is manifest that the tax imposed will have been levied, not upon the mass of the estate, but upon each particular legatee or beneficiary, since the share of such person will have paid a rate of taxation predicated upon the amount of the legacy and the relationship, or want of relationship, of the particular recipient thereof to the deceased. This being the case, no room would be left for the contention that the tax was imposed on the whole estate. On the other hand, if the whole sum of the taxation on all the shares, calculated on the basis of the relationship of each beneficiary and the amount received, be deducted from the mass of the estate, then, each recipient would pay only a proportion of the amount without reference to his relationship to the deceased. This would result in imposing the tax on the whole personal estate, and ratably distribute the burden among all the beneficiaries. But to reach this the entire classification, grading the rate of the tax by the degrees of relationship, would have to be disregarded. The dilemma, therefore, which is involved in the contention that the statute imposes the tax, not on each legacy or distributive share, but on the whole personalty, is

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this: If the tax is levied and collected according to the classifications in the statute, it is clearly on the legacy or distributive share. If, on the contrary, it is levied on the entire personal estate, then the classifications of the statute must be ignored and the construction be upheld which maintains that the act has classified the rate of tax by the relationship of the beneficiaries to the deceased, and has then disregarded the classification by collecting the tax wholly without reference to such relationship. This construction, besides eliminating a large portion of the text of the act, would do violence to its plain import, which is to make the rate of the tax depend upon the character of the links connecting those taking with the deceased. This is greatly fortified by other portions of the act. At the close of the fifth subdivision of section 29, one of the clauses creating a classification with respect to remote relationship, or want of relationship, to the deceased, it is provided as follows:

"*Provided*, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed as aforesaid, shall be exempt from tax or duty."

Now, mark, the word is "passing" by will, etc., which excludes a conception that the whole amount of the estate, and not the particular portions thereof which passed, is the subject of the tax. And the exemption, from the tax or duty, of the legacy, etc., given to the husband or wife of a deceased, implies that the scheme of taxation is of the legacies, etc., and not of the whole personal estate. This must be so, unless it can be said that the statute in terms exempts the legacy to a husband or wife from the legacy tax otherwise imposed, although no legacy taxes resulted from the statute.

The provisions for the collection of the tax contained in section 30 of the act confirm the construction that the passing of each legacy or distributive share, and not the entire personal estate of a deceased person, forms the subject of the tax. Thus, before payment and distribution to the legatees, etc., an executor, administrator or trustee is required to pay "the amount of the duty or tax assessed upon such legacy or distributive share,"

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and to "make and render a schedule," etc., in duplicate, "of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue thereon," and the schedule is required to "contain the names of each and every person entitled to any beneficial interest therein."

Whatever be the obscurity it is illumined when the light of the previous legislation, which we have already reviewed, is thrown on it. The passing of legacies and distributive shares were the objects taxed under the English legacy act. They were the subjects taxed under the act of Congress of 1797. By the act of 1862, as we have seen, the whole estate was reached by a probate duty, whilst a distinct duty was charged upon legacies and distributive shares in personal property. When the act of 1864 was enacted there was added a succession tax on real estate, modeled, as said by this court and as shown by the act itself, upon the English Succession Duty Act, which treated each particular gift of real estate as a distinct succession, separately liable for the duty laid by the act. The legacy tax and the succession tax were thus co-related and rested upon the same theory; that is, both considered, they created a tax on the passing of each particular gift or distributive share of both the personal and real estate, treated as separate, one from the other, and each as forming a distinct estate subject to taxation. To assume that, when the succession duty was adopted in 1864, the legacy tax, which was also reënacted in that act, lost its character and became a tax levied, not on the passing of the legacies and distributive shares, but upon the whole amount of the estate before passing, would destroy the entire harmony of the system, and lead to a confession that a confusion of thought existed which cannot in reason be admitted. Indeed, it is difficult to conceive that the act of 1864 contemplated that either the legacy duty or the succession duty which it imposed should be upon the whole estate, since the tax to be paid by the whole estate was therein distinctly and separately provided for by means of the probate duty. If the tax on the whole estate can be, by implication, inserted, the same reasoning would also imply that the succession duty must be likewise treated. It would thus be that the entire act of 1864 would be in force despite its

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repeal and the failure to reënact in the present law either the whole estate or succession duty.

What it was considered the act of 1864 levied the tax on is also in addition demonstrated by the amendments made to the act of 1864 in 1866. One of these amendments was: "That any legacy or share of personal property passing as aforesaid to a minor child of the person who died possessed as aforesaid shall be exempt from taxation under this section, unless such legacy or share shall exceed the sum of one thousand dollars, in which case the excess only above that sum shall be liable to said taxation." Another was that any tax paid under the provisions of sections 124 and 125 of the act of 1864 should "be deducted from the particular legacy or distributive share, on account of which the same is charged." In other words, the act expressly commanded that to be done, which it was impossible should be done compatibly with any hypothesis that the tax was on the whole personal estate, for, as we have seen, under that assumption the deduction of the tax from the whole estate was essential.

That the provisions of the act of 1864 were in mind when the present act was drafted is apparent, since it is not disputed that the act under review, so far as the tax on legacies and distributive shares is concerned, is an exact reproduction of the original act of 1864, except to the extent that the present act contains provisions relating to a progressive increase of rates. We say of the original act, because the present act does not contain in it the amendments to which we have referred, made in 1866; the fair inference being that the writer of the present act had before him the original text of the act of 1864, and not that text as amended by the act of 1866.

As the only provisions added to the present law relate to the progressive rate upon the legacies, it follows that, unless these added clauses provide for a tax on the whole estate instead of the legacies, it is a demonstration that the whole estate is not taxed by the present act. That the progressive rate features inserted in the act now under review have even no tendency to bring about such a result, we proceed now to demonstrate. We reproduce such portions of section 29 as are essential, putting in

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brackets the words found in the act of 1898 under review, which were not contained in the corresponding provisions existing in the act of 1864:

"That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property where the whole amount of such personal property as aforesaid shall exceed the sum of [ten] thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax to be paid to the United States, as follows, that is to say: [Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:]"

Immediately following this are five classifications of beneficiaries, each varying in rate. These are followed by the progressive rate clause, which is as follows:

["Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half, and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of such property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of such property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three."]

Observing closely the text, it is apparent that the clause

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therein which points out what is taxed is an exact copy of the act of 1864, except the substitution of the "ten" for the word "one." The subject taxed, therefore, under the present act is the same which was taxed under the act of 1864. This is the equivalent of a mathematical certainty. Coming, then, to the added provision at the end of the first paragraph, it says: "Where the whole amount of said personal property shall exceed in value," etc. This, however, creates no new object of taxation, but simply provides that where said personal property, that is, the property previously specified, exceeds a certain amount, a given rate shall be imposed. So, in the further addition, pointing out the progressive feature, the law says, "Where the amount or value of said property shall exceed the sum of," etc., thus clearly again referring to the objects of taxation, the property described in the first part of the act, which was identically the same thing described in the act of 1864. The demonstration, therefore, is conclusive that the progressive feature clause added in the present act creates no new subject of taxation; it simply provides for the progressive rates on the said property mentioned in the opening sentences, which is described exactly as it was in the act of 1864. Now, as the act of 1864 taxed, not the whole estate, but each particular legacy or distributive share, the conclusion cannot be escaped that the present law does the same thing, except that there is added thereto a progressive rate.

The tax being then on the legacies and distributive shares, the rate primarily being determined by the relation of the legatees or distributees to the estate, does the law command that the progressive rate of tax which it imposes on the legacies or distributive shares shall be measured, not separately by the amount of each particular legacy or distributive share, but by the sum of the whole personal estate? This, as we have said, is the interpretation of the act which was adopted by the assessor in levying the taxes under review, and which was sustained by the court below.

The unsoundness of the construction, that the act measures the rate of tax by the whole estate, is fully shown by what we have already said, for, as under the act of 1864 the legacies and

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distributive shares alone were taxed, and as in reënacting it the exact language was retained, (omitting the separate provisions in the act of 1864, taxing the whole estate by a probate duty and taxing successions,) and as the progressive rates only refer to the object taxed, as provided in the act of 1864, it results that under no reasonable construction can the present act be held to provide for a rate of tax computed on the whole estate. Even, however, if all the previous history be shut out of view, and even if the omission from this act of the whole estate duty which obtained under the act of 1864 be for the moment forgotten, the text of the law, considered alone, would not support the construction that it provides for a tax upon each legacy and distributive share by a rate of tax measured by the whole estate. In order to make this clear we will briefly analyze the text. In doing so, however, we eliminate the attempt made by counsel in argument to show the significance thereof by expressions used in the course of the debate by certain members of the Senate. *Maxwell* v. *Dow*, 176 U. S. 581, and cases there cited.

The meaning of the act largely turns upon the following words, contained in the opening paragraph of section 29: "Where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing," etc. If these words refer to the whole amount of the estate left by a deceased person, then the words added in the act of 1898, to the end of the paragraph, viz., "where the whole amount of *said* personal property shall exceed in value ten thousand, and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be," as stated in five classifications next enumerated, must refer to the same thing. It follows likewise that the progressive rate clause, which says, "where the amount or value of *said* property shall exceed the sum of," etc., must relate to the same thing; that is, the whole amount of the estate, as stated in the opening sentences of section 29. If this view be correct, then all legacies in an estate of ten thousand dollars are exempt, and all legacies, whatever be their amount, in an estate above ten thousand dollars, have the original rate adjusted according to the classifications, and that rate is in-

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creased progressively by the whole amount of the estate, and not by the amount of the legacy. If, on the other hand, the words "where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars," found in the first sentence of section 29, relate to the whole amount of each legacy, then legacies under ten thousand dollars are not taxable, and those above ten thousand pay the original rate provided in the classifications, and become subject to the progressive increase clause, according to the amount of the legacy, and not by the whole amount of the estate.

But the pivotal words in the first sentence are not simply "the whole amount of such personal property," but the "whole amount of such personal property *as aforesaid*." This can only refer to the preceding part of the sentence, where what is contemplated by the words "*as aforesaid*" is and can alone be "*any* legacies or distributive shares arising from personal property . . . passing after the passage of this act." In other words, the statute itself by the reference clause establishes that the whole amount referred to is the sum or value of each particular legacy, etc., separately considered, passing from the deceased to the taker thereof. And this construction of the vital words referred to, derived from what immediately precedes them, is sustained by what immediately follows them, that is, the clause imposing the tax on "any personal property or interest therein, transferred by deed," etc., "made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons," etc. This latter clause treats each item of property given in contemplation of death otherwise than by last will and testament, as a distinct entity to be considered for the purpose of levying the tax. Each of such items, therefore, separately considered, becomes for the purpose of the tax, the whole amount of such personal property, the statute clearly recognizing that there may be partial and distinct interests in each item of personal property, such as an interest for life in one person with a remainder in another. Thus by the two clauses, which are linked together by the words "the whole amount of such personal property," it develops that the amount referred to is the separate and distinct

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sums or items of personal property passing, and not the whole amount of the entire estate, which, as has been shown in considering the previous proposition, the act did not purport to tax as such.

The subsequent provisions of the act lend cogency to this view Thus, in section 30, it is made the duty of the executor, etc., to pay over to the collector "the amount of the duty or tax assessed upon *such* legacy or distributive share," and he is also commanded to deliver to the collector a schedule "of the amount of *such* legacy or distributive share, together with the amount of the duty which has accrued or shall acrue thereon."

At the risk of repetition, we recur again to a particular feature in the prior legislation, because it very pertinently points out the error which has given rise to the assumption that the "whole personal estate as aforesaid" meant in the act of 1864, or means in this act, the whole amount of the personal estate left by the deceased, and not the whole amount of each legacy considered as a separate estate for the purpose of taxation. Attention has been called to the fact that, in accordance with the English system, the act of 1864 engrafted on the provisions of the act of 1862 a succession or real estate inheritance tax. In doing so, it was unequivocally declared in the law that each separate gift of real property was a distinct succession or estate. In other words, the statute itself announced the rule that the whole amount of each estate subject to taxation, under the succession tax, was the whole amount of each separate item of gift treated as an estate for the purpose of the levy and collection of the taxes thereon. How, then, can it be supposed that the act of 1864 contemplated that the section relating to the legacy should have one meaning, whilst the whole amount of the estate in the sections relating to succession or real estate taxes should have another? Must it not be considered that the statute provided for no such discordant and unjust discrimination, but that, on the contrary, it harmoniously expressed the rule obtaining from the beginning, that is, the levy of a legacy tax on personal estate passing by death to each particular beneficiary treated separately as the amount subject to taxation and the same rule applied to the succession tax by treating each

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item of real estate as the whole amount of an estate passing separately for the purpose of taxation?

It is true that in the practical execution of the act of 1864 the words "the whole amount of such personal property . . . shall exceed the sum of one thousand dollars" were administratively construed as applying to the entire personal estate left by one deceased, and not to the distinct legacies or interests. It resulted that where an estate did not equal one thousand dollars, no tax was collected upon legacies or distributive shares therein, and where the estate exceeded one thousand dollars all legacies and distributive shares, whatever the amount of each, were taxed. Any force resulting from this administrative view, however, is weakened by the fact that the contrary construction prevailed as to the other portions of the act of 1864, the succession duty, where the amount of the tax was determined by the amount or value of each particular item of real property. The administrative construction therefore of the act of 1864 was contradictory, since it enforced one rule on the one hand and an absolutely conflicting one on the other. Besides, the whole estate was taxed as such by the probate duty found in the act of 1864.

As we have said, the act of 1864 was repealed in 1870. 16 Stat. 256. After the repeal, the court was called upon, in *Mason* v. *Sargent*, 104 U. S. 689, to consider whether, when one who held a life estate in a legacy died subsequent to the repeal of the act, the interest of the legatees in remainder was subject to the inheritance tax. In passing upon this question this court said (p. 690):

"The tax in question was imposed by sec. 124 of the act of June 30, 1864, c. 173, (13 Stat. 223, 285,) upon legacies or distributive shares of personal property exceeding the sum of $1000, passing, after the passage of the act, from a decedent, either testate or intestate, in the hands of an executor, administrator or trustee, varying in rate, as the party beneficially entitled was less or more remote in consanguinity, or a stranger in blood, to the person from whom it passed; with a proviso that legacies or distributive interests in intestate estates, passing to husband or wife, should be exempt from such tax."

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The opinion thus expressed is in conflict with the assumption that the whole estate contemplated, not each legacy or distributive share, but the entire amount of personal property of the deceased, and this construction may be well considered to have been in effect adopted by the reënactment of the act of 1864, without any change indicating an intention to the contrary.

Granting, however, that there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of $10,500, bequeaths to a hospital ten thousand dollars. The rate of tax would be five per cent, and the amount of tax five hundred dollars. Another person dies at the same time, leaves an estate of one million dollars, and bequeaths ten thousand dollars to the same institution. The rate of tax would be 12½ per cent, and the amount of the tax $1250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construc-

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tion must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given.

We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. *Bate Refrigerating Co.* v. *Sulzeberger*, 157 U. S. 1, 37; *Wilson* v. *Rousseau*, 4 How. 646, 680; *Bloomer* v. *McQuewan*, 14 How. 539, 553; *Blake* v. *National Banks*, 23 Wall. 307, 320; *United States* v. *Kirby*, 7 Wall. 482, 486. Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered comes from the want of insight pointed out by Hanson in a passage which we have heretofore quoted; that is, it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation.

It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems. On this question, however, in any of its aspects, we do not even intimate an opinion, as no occasion for doing so exists, since, as we understand the law, we are clearly of opinion that it does not sustain the construction which was placed on it by the court below.

By elimination, the process of reasoning which we have resorted to in order to demonstrate the unsoundness of the two first contentions as to the meaning of the statute renders it unnecessary to say anything in elaboration of the significance of the statute as embodied in the third proposition, which is, that the tax is on the legacies and distributive shares, the rate being primarily determined by the classifications and being progres-

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sively increased according to the amount of the legacies or shares. Its correctness is at once apparent when the other views are disposed of. As the "whole amount of such personal property as aforesaid" relates to the sum of each legacy or distributive share considered separately, it follows that all legacies not exceeding ten thousand dollars are not taxed, and that those above that amount are taxed primarily by the degree of relationship or absence thereof, specified in the five classifications contained in the statute, and that the rate of tax is progressively increased by the amount of each separate legacy or distributive share. This being the correct interpretation of the statute, it follows that the court below erroneously maintained a contrary construction, and, therefore, the tax assessed and collected was for a larger amount than the sum actually due by law.

The precise meaning of the law being thus determined, the question whether the tax which it imposes is direct, and hence subject to the requirement of apportionment, arises for consideration. That death duties, generally, have been from the beginning in all countries considered as different from taxes levied on property, real or personal, directly on account of the ownership and possession thereof, is demonstrated by the review which we have previously made. It has also been established by what we have heretofore said, that such taxes, almost from the beginning of our national life, have been treated as duties, and not as direct taxes. Of course, they concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed. This legislative and administrative view of such taxes has been directly upheld by this court. In *Scholey* v. *Rew*, 23 Wall. 331, 349, to which we have heretofore referred, the question presented was the constitutionality of the provisions of the act of 1864, imposing a succession duty as to real estate. The assertion was that the duty was repugnant to the Constitution, because it was a direct tax and had not been apportioned. The tax was decided to be constitutional. The court said (p. 346):

"But it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of

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these provisions. Instead of that it is plainly an excise tax or duty, authorized by section eight of article one, which vests the power in Congress to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare.

* * * * * * * *

"Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land, is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy."

This is decisive against the contrary contention here relied on, unless it be that the decision in *Scholey* v. *Rew* has been overruled, and therefore is no longer controlling.

The argument is that the decision in *Scholey* v. *Rew* was overruled in *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 429; 158 U. S. 601. This contention is thus supported in argument.

As in the course of the opinion in *Scholey* v. *Rew* the court said that taxes on successions could not be distinguished in principle from an income tax, therefore the decision in the *Pollock* case, which held that an income tax was direct, it is argued, necessarily decided that an inheritance tax was also direct. But in the *Pollock* case the decision in *Scholey* v. *Rew* was not overruled. On the contrary, the correctness of the decision in the latter case as to the particular matter which it actually decided in effect was reaffirmed. In consequence of the statement made in *Scholey* v. *Rew*, that an income tax and a succession tax could not be distinguished one from the other, that case was relied on in the *Pollock* case by counsel in argument and by the members of the court who dissented, as establishing, for the reason stated, that the income tax was not direct. The court, however, treated *Scholey* v. *Rew* as inapplicable to an income tax, because it considered that whether an income tax was direct was not actually involved in the latter case, and hence the illustration which was used in *Scholey* v. *Rew* as to

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an income tax was held not to have been a decision on the question of whether or not an income tax was direct.

The court said (157 U. S. 577):

"*Scholey* v. *Rew*, 23 Wall. 331, was the case of a succession tax, which the court held to be 'plainly an excise tax or duty' upon the devolution of the estate or the right to become beneficially entitled to the same, or the income thereof, in possession or expectancy. It was like the succession tax of a State, held constitutional in *Mager* v. *Grima*, 8 How. 490; and the distinction between the power of a State and the power of the United States to regulate the succession of property was not referred to, and does not appear to have been in the mind of the court. The opinion stated that the act of Parliament, from which the particular provision under consideration was borrowed, had received substantially the same construction, and cases under that act hold that a succession duty is not a tax upon income or upon property, but on the actual benefit derived by the individual, determined as prescribed. *In re Elwes*, 3 H. & N. 719; *Attorney General* v. *Sefton*, 2 H. & C. 362; *S. C.* (H. L.) 3 H. & C. 1023; 11 H. L. Cas. 257."

The argument now made, therefore, comes to this: Although in the *Pollock* case the doctrine which the court considered as having been actually decided in *Scholey* v. *Rew* was not overruled, nevertheless, because an example which was made use of in the course of the opinion in *Scholey* v *Rew* was disregarded, the *Pollock* case therefore overruled *Scholey* v. *Rew*. The issue presented in the *Pollock* case was whether an income tax was direct within the meaning of the Constitution. The contentions which the case involved were thus presented. On the one hand, it was argued that only capitation taxes and taxes on land as such were direct, within the meaning of the Constitution, considered as a matter of first impression, and that previous adjudications had construed the Constitution as having that import. On the other hand, it was asserted that, in principle, direct taxes, in the constitutional sense, embraced not only taxes on land and capitation taxes, but all burdens laid on real or personal property because of its ownership, which were equivalent to a direct tax on such property, and it was affirmed that the pre-

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vious adjudications of this court had settled nothing to the contrary. The issues which were thus presented in the *Pollock* case, it will be observed, had been expressly reserved in *Scholey* v. *Rew*, where it was said (23 Wall. 346):

"Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land, is a question not absolutely decided, nor is it necessary to determine it in the present case."

The question which was thus reserved in *Scholey* v. *Rew*, and which was presented for decision in the *Pollock* case, was decided in the latter case, the court holding that taxes on the income of real and personal property were the legal equivalent of a direct levy on the property from which the income was derived, and therefore required apportionment. But there was no intimation in the *Pollock* case that inheritance taxes—which had been held in *Scholey* v. *Rew* not to be direct, which had from all time been considered as being imposed not on property, real or personal, as ordinarily understood, but as being levied on the transmission or receipt of property occasioned by death, and which had from the foundation of the government been treated as a duty or excise—were direct taxes within the meaning of the Constitution. Undoubtedly, in the course of the opinion in the *Pollock* case, it was said that, if a tax was direct within the constitutional sense, the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, because imposed upon property solely by reason of its ownership, could not be changed by affixing to it the qualification of excise or duty. Here we are asked to decide that a tax is a direct tax on property which has at all times been considered as the antithesis of such a tax; that is, has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.

But it is asserted that it was decided in the income tax cases that, in order to determine whether a tax be direct within the meaning of the Constitution, it must be ascertained whether the

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one upon whom by law the burden of paying it is first cast, can thereafter shift it to another person. If he cannot, the tax would then be direct in the constitutional sense, and, hence, however obvious in other respects it might be a duty, impost or excise, it cannot be levied by the rule of uniformity and must be apportioned. From this assumed premise it is argued that death duties cannot be shifted from the one on whom they are first cast by law, and therefore they are direct taxes requiring apportionment.

The fallacy is in the premise. It is true that in the income tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall. The proposition now relied upon was considered and refuted in *Nicol* v. *Ames*, 173 U. S. 509, 515, where the court said:

"The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United

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States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.

"In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

Concluding, then, that the tax under consideration is not direct within the meaning of the Constitution, but, on the contrary, is a duty or excise, we are brought to consider the question of uniformity.

The contention is that because the statute exempts legacies and distributive shares in personal property below ten thousand dollars, because it classifies the rate of tax according to the relationship or absence of the relationship of the taker to the deceased, and provides for a rate progressing by the amount of the legacy or share, therefore the tax is repugnant to that portion of the first clause of section 8 of article 1 of the Constitu-

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tion, which provides "the duties, imposts and excises shall be uniform throughout the United States."

The argument to the contrary, whilst conceding that the tax devised by the statute does not fulfill the requirement of equality and uniformity, as those words are construed when found in state constitutions, asserts that it does not thereby follow that the taxes in question are repugnant to the Constitution of the United States, since the provision in the Constitution, that "duties, imposts and excises shall be uniform throughout the United States," it is insisted has a different meaning from the expression equal and uniform, found in state constitutions. In order to decide these respective contentions it becomes at the outset necessary to accurately define the theories upon which they rest.

On the one side, the proposition is that the command that duties, imposts and excises shall be uniform throughout the United States relates to the inherent and intrinsic character of the tax; that it contemplates the operation of the tax upon the property of the individual taxpayer, and exacts that when an impost, duty or excise is levied, it shall operate precisely in the same manner upon all individuals; that is to say, the proposition is that "uniform throughout the United States" commands that excises, duties and imposts, when levied, shall be equal and uniform in their operation upon persons and property in the sense of the meaning of the words equal and uniform, as now found in the constitutions of most of the States of the Union. The contrary construction is this: That the words "uniform throughout the United States" do not relate to the inherent character of the tax as respects its operation on individuals, but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate. The two contentions then may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost or excise which is not intrinsically equal and uniform in its opera-

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tion upon individuals, and the other that the power of Congress in levying the taxes in question is by the terms of the Constitution restrained only by the requirement that such taxes be geographically uniform.

The argument as to intrinsic uniformity is asserted to find support in expressions used by some of the Justices in the carriage tax case, *Hylton* v. *United States*, 3 Dall. 171. The statements thus referred to are as follows:

Mr. Justice Paterson said (p. 180):

"Apportionment is an operation on States, and involves valuations and assessments, which are arbitrary, and should not be resorted to but in case of necessity. Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to States, and is at once easy, certain and efficacious."

Mr. Justice Iredell said (p. 181):

"If it can be considered as a tax, neither direct within the meaning of the Constitution, nor comprehended within the term duty, impost or excise, there is no provision in the Constitution, one way or another, and then it must be left to such an operation of the power, as if the authority to lay taxes had been given generally in all instances, without saying whether they should be apportioned or uniform; and in that case, I should presume, the tax ought to be uniform, because the present Constitution was particularly intended to affect individuals, and not States, except in particular cases specified. And this is the leading distinction between the Articles of Confederation and the present Constitution."

And the following passage from the opinion in *United States* v. *Singer*, 15 Wall. 111, 121, is also asserted to support the contention that a tax was imposed upon a distiller, in the nature of an excise, and the question arose whether in its imposition upon different distillers the uniformity of the tax was preserved, and the court said:

"The law is not in our judgment subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they

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shall be uniform throughout the United States. The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits, wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike."

In opposition to this view it is urged that the language used by the Judges in the *Hylton* case was not intended to and does not, when properly understood, refer to the inherent character of the tax, but simply called attention to the fact that, differing from the Articles of Confederation, power was given to Congress by the Constitution to levy duties, imposts and excises, thus acting upon individuals; and that the language in the *Singer* case, whilst it uses the word equal, clearly referred, not to an inherent uniformity, but to a geographical one. And this, it is argued, is rendered certain by the opinion in the *Head Money cases*, 112 U. S. 580, 594, where, in considering the objection that a tax imposed upon the owners of steam vessels for each passenger landed at New York from a foreign port, was void because not levied by any rule of uniformity, the court, speaking by Justice Miller, said:

"The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this by ocean navigation, is uniform, and operates precisely alike in every port of the United States, where such passengers can be landed."

To overcome the construction in favor of geographical uniformity asserted by the government to arise from the language just quoted, it is, in the first place, argued that when correctly understood, it does not sustain the claim so based on it, and in the second place, that if it does, it is not binding as authority, because the *Head Money* cases involved, not the uniformity clause of the Constitution, but that portion of clause 6 of section 9 of article 1 of the Constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

It is conceded that if the preference clause just referred to

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and the uniform clause have the same meaning, that of course merely a geographical operation was intended. But it is insisted that the two clauses are distinct in import, and that the difference in language of the two manifests the distinct meanings which should be affixed to them. It is apparent that the controversy cannot be disposed of by a mere reference to prior adjudications, since reliance is, by both sides, in effect, placed upon the same decisions. But to determine which view of the cited authorities is the correct one, it will become necessary not only to analyze the facts which were at issue in the decided cases, but also to elucidate the language of the opinions which have given rise to the conflicting constructions now placed upon such language, by an examination of the subjects to which the language related. As to do this calls for a critical consideration of the provisions of the Constitution referred to in the opinions relied on, we shall, for the moment, put the cases referred to out of mind, and consider the controversy presented as one of original impression. We are, moreover, impelled to this course from the fact that as the word "uniform," or the words "equal and uniform," are now generally found in state constitutions, and as there contained have been with practical unanimity interpreted by state courts as applying to the intrinsic nature of the tax and its operation upon individuals, if it be that the words "uniform throughout the United States," as contained in the Constitution of the United States, have a different significance, the reason for such conclusion should be carefully and accurately stated.

Considering the text, it is apparent that if the word "uniform" means "equal and uniform" in the sense now asserted by the opponents of the tax, the words "throughout the United States" are deprived of all real significance, and sustaining the contention must hence lead to a disregard of the elementary canon of construction which requires that effect be given to each word of the Constitution.

Taking a wider view, it is to be remembered that the power to tax contained in section 8 of article 1 is to lay and collect "taxes, duties, imposts and excises. . . . But all duties, imposts and excises shall be uniform throughout the United

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States." Thus, the qualification of uniformity is imposed, not upon all taxes which the Constitution authorizes, but only on duties, imposts and excises. The conclusion that inherent equality and uniformity is contemplated involves, therefore, the proposition that the rule of intrinsic uniformity is applied by the Constitution to taxation by means of duties, imposts and excises, and it is not applicable to any other form of taxes. It cannot be doubted that in levying direct taxes, after apportioning the amount among the several States, as provided in clause 4 of section 9 of article 1 of the Constitution, Congress has the power to choose the objects of direct taxation, and to levy the quota as apportioned directly upon the objects so selected. Even then, if the view of inherent uniformity be the true one, none of the taxes so levied would be subjected to such rule, as the requirement only relates to duties, imposts and excises.

But the classes of taxes termed duties, imposts and excises, to which the rule of uniformity applies, are those to which the principle of equality and uniformity in the sense claimed, is in the nature of things the least applicable and least susceptible of being enforced. Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned. Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries. The claim of intrinsic uniformity, therefore, imputes to the framers a restriction as to certain forms of taxes, where the restraint was least appropriate and the omission where it was most needed. This discord which the construction, if well founded, would create, suggests at once the unsoundness of the proposition, and gives rise to the inference that the contrary view by which the unity of the provisions of the Constitution is maintained, must be the correct one. In fact, it is apparent that if imposts, duties and excises are controlled by the rule of intrinsic uniformity, the methods usually employed at the time of the adoption of the

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Constitution in all countries in the levy of such taxes would have to be abandoned in this country, and, therefore, whilst nominally having the authority to impose taxes of this character, the power to do so would be virtually denied to Congress.

Now, that the requirement that direct taxes should be apportioned among the several States, contemplated the protection of the States, to prevent their being called upon to contribute more than was deemed their due share of the burden, is clear. Giving to the term uniformity as applied to duties, imposts and excises a geographical significance, likewise causes that provision to look to the forbidding of discrimination as between the States, by the levying of duties, imposts or excises upon a particular subject in one State and a different duty, impost or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes. And the conclusion that the possible discrimination against one or more States was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, imposts and excises, is greatly strengthened by considering the state of the law in the mother country and in the colonies, and the practice of taxation which obtained at or about the time of the adoption of the Constitution.

In England, nowhere had the conception of a limitation on the power to levy duties, imposts and excises by an intrinsic rule of uniformity found utterance, and the practice which had obtained, it may be said, was commonly to the contrary. Passing without special notice the system of customs (import and export) duties existing in England from a time long prior to the Revolution, which was replete with examples of taxation not fulfilling the requirement of intrinsic equality and uniformity, we briefly refer to a few examples of the same nature afforded by statutes imposing internal taxation in the mother country.

Internal taxation, in the form of excises, was introduced into England by a Parliamentary resolution passed on March 28, 1643, and carried into effect by an ordinance of the same date. 2 Dowell, History of Taxation, 9. Many of these excises were imposed with reference to the supposed ability of the

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party whose property, office, etc., was assessed to pay the same. Thus, in 1747, a duty of excise was imposed upon coaches and other carriages kept for personal use. 20 Geo. II, ch. 10; 7 Stat. 15. In 1756 a duty of excise was imposed upon the possessor of plate over a certain weight. 29 Geo. II, ch. 14; 7 Stat. 661. In 1758 all offices of profit, other than naval and military, were subjected to the payment of duty *when the salary exceeded one hundred pounds.* 31 Geo. II 1257, 8 Stat. 212, ch. 22. In 1777 a duty was imposed upon employers of coachmen and other men servants. 17 Geo. III, ch. 39; 13 Stat. 103. In 1779 a duty was imposed, not upon all forms of locomotion, but upon traveling by post, the usual method of locomotion among the wealthier classes. 19 Geo. III, ch. 51; 13 Stat. 414. In 1784 a duty was laid, not uniformly with respect to all horses kept by a person, but in respect to horses kept for the saddle or driving in carriages. 24 Geo. III, ch. 31; 14 Stat. 496.

It is accurate to say that in the colonies prior to the Confederation, and in the States prior to the time of the adoption of the Constitution, the wisdom of restraining the levy of duties, imposts and excises by an express requirement of inherent equality and uniformity had likewise nowhere found expression. The state constitutions of the revolutionary period (except, perhaps, those of Massachusetts and New Hampshire) contained no provisions indicating an intent to control the bodies authorized to levy taxes and raise money in the exercise of a sound discretion as to the mode to be adopted in levying taxation. The people were content to commit to their representatives the enactment of reasonable and wholesome laws, being satisfied with the protection afforded by a representative and free government and by the general principles of the common law protecting the inalienable rights of life, liberty and property.

The Massachusetts constitution of 1780 and that of 1788 of New Hampshire merely required that the assessments of rates and taxes should be proportional and reasonable and with a view to equality, but there was no such qualification expressed as to the authority conferred "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise

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and commodities whatsoever, brought into, produced, manufactured or being within the same."

In taxing laws of the original States prior to the Convention of 1787, exemptions were allowed from a consideration of what was deemed best for the general welfare, and taxes were frequently laid from a consideration of the presumed ability of the owner to pay the tax. Discriminations and exemptions were also contained in various state taxing laws, which illustrate the discretion vested in the legistative bodies of the States in the latter part of the eighteenth century. We print in the margin a few examples.[1]

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[1] In chapter 5 of the Pennsylvania Statutes, of March 27, 1782, a tax was laid upon "Negro and mulatto servants above the age of twelve years; horses, mares and cattle, above three years old; coaches and carriages kept by any person for his or her own use, and for the purpose of traveling or pleasure." The chaises or riding chairs of ministers of the gospel, the president, professors or tutors of Harvard College, or grammar school masters, were exempt from duty of excises laid upon certain described coaches and other carriages, by an act passed in Massachusetts on July 10, 1783.

In a law of 1784, at page 131, of the Laws of Connecticut, the listers were required in the list of polls and ratable assets of the inhabitants of the respective counties to list polls from 21 to 70 years of age at eighteen pounds, and polls from 16 to 21 years old at nine pounds; houses were to be listed, not uniformly, but according to the number of fireplaces; attorneys at law and physicians and surgeons were to be listed, the least practitioner at a certain sum, and larger practitioners higher in proportion; shopkeepers or traders, the lowest class at twenty-five pounds, and all others in due proportion; and each allowed and licensed tavern keeper was to be set at fifteen pounds, and to be added to in proportion to their situation and profits, according to the best judgment of the listers; and persons following any "mechanical art or mystery, such as blacksmiths, shoemakers, tanners, goldsmiths, or silversmiths," and all other works and occupations followed or pursued by any persons by which profits arise, except business in any public office, husbandry and common labor for hire, were to be assessed by the best judgment of the listers.

The general assembly of New Jersey, by the act (ch. 400) December 22, 1783, for the purpose of raising ten thousand pounds for the support of government and the contingent expenses for the year 1784, enumerated a large number of items of persons and articles which were made taxable by the act, to be valued and rated by the assessors within stated sums. Single men who kept a horse were to be rated at not exceeding ten shillings, while single men who did not keep a horse were to be rated at not exceeding five

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It cannot be, therefore, supposed that the framers of the Constitution, in using the words "uniform throughout the United States," contemplated to confer the power to levy duties, imposts and excises, and yet to accompany this grant of authority with a restriction which had never found expression as to such taxes at that time anywhere, and which was contrary to the practice which had uniformly obtained both in the mother country and in the colonies, and in the States prior to the adoption of the Constitution. But, one of the most satisfactory answers to the argument that the uniformity required by the Constitution is the same as the equal and uniform clause which has since been embodied in so many of the state constitutions, results from a review of the practice under the Constitution from the beginning. From the very first Congress down to the present date, in laying duties, imposts and excises, the rule of inherent uniformity, or, in other words, intrinsically equal and uniform taxes, has been disregarded, and the principle of geograpical uniformity consistently enforced. Take, for a general example,

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shillings. Male slaves were to be taxed at not exceeding five shillings, but it was provided "That no slave is to be taxed who is unable to work, or that may appear to the assessors to be no profit to his master or mistress." Fisheries where fish were caught for sale, and saw mills that sawed timber for sale or hire, were to be rated not exceeding two pounds.

In South Carolina, by an act passed March 28, 1787, 5 Stat. 24, entitled "An act for raising supplies for the year 1787," a tax of nine shillings and four pence was laid upon free negroes and mulattoes from 16 to 50 years of age, while the tax upon free white men was upon those neither lame or disabled, and who were between 21 to 50 years of age, while the tax was to be ten shillings per head. And a tax of one per cent was laid on the profits of faculties and professions, clergymen, schoolmasters and schoolmistresses excepted.

In Delaware, by a law passed in the sixteenth year of the reign of Geo. II (Laws of Delaware, Adams' ed., pub. 1797, p. 257), and apparently in force when the constitution of 1792 was adopted (Ib. pp. 396, 429), unsettled tracts and parcels of land were exempted from taxation, and the assessors were directed in assessing persons to have due regard "to such as are poor and have a charge of children," the poorer sort of such not to be rated under eight pounds. Single men without visible estate were to be rated at not less than twelve pounds nor more than twenty-four pounds, exempting, however, single men under twenty-one years of age, and apprentices and such as had not been out of apprenticeship more than six months.

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specific import duties, by which particular specific rates are imposed on enumerated articles, without reference to their value. It is manifest that all such duties are void, if intrinsic equality and uniformity be the rule, and yet in all the great controversies which have arisen over the policy of impost duties generally, and particularly as to the economic wisdom of specific duties, never has it been contended that the power to impose them did not exist because of the uniformity clause of the Constitution. So, also, mention may be made of the common form of the excises on distilled spirits with the tax per gallon without reference to the value thereof.

Indeed, tariff duties have not only varied with different articles, but have varied with the different valuations of the same article. We cite a few instances of the latter character, found in the tariff acts of August 5, 1861, 12 Stat. 293, and August 27, 1894, 28 Stat. 530, respectively. In the act of 1861 a duty was imposed —

"On all silks valued at not over one dollar per square yard, thirty per centum ad valorem; on all silks valued over one dollar per square yard, forty per centum ad valorem; on all silk velvets or velvets of which silk is the component material of chief value, valued at three dollars per square yard or under, thirty per centum ad valorem; valued at over three dollars per square yard, forty per centum ad valorem."

In the act of 1894 occurs the following paragraph:

"280. On woolen and worsted yarns made wholly or in part of wool, worsted, the hair of the camel, goat, alpaca or other animals, valued at not more than forty cents per pound, thirty per centum ad valorem; valued at more than forty cents per pound, forty per centum ad valorem."

So also a single paragraph of the tariff acts has frequently contained an elaborate system of minimum classifications and compound duties, as well as exemptions for importations below a certain value. See provisions discussed in *Arthur* v. *Vietor*, 127 U. S. 572, 575; *Hedden* v. *Robertson*, 151 U. S. 520, 521; *Arthur* v. *Morgan*, 112 U. S. 495, 498.

Nor can it be said that these illustrations relate to legislation enacted long after the adoption of the Constitution, when by

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lapse of time an erroneous conception as to the meaning of the Constitution had arisen, for the examples to which we have just referred are but types of many forms of taxation by way of duties, imposts and excises which were enacted without question from the very beginning, and have continued in an unbroken line to the present time, sanctioned by the founders of our institutions and approved in practical execution by all the illustrious men who have directed the public destinies of the nation. Excise taxes were largely used during the administration of President Washington, and again during and after the war of 1812. It may properly be said of these excises that none of them were uniform according to the principles now contended for, yet no constitutional question in this regard was ever raised about them. A partial list of some of the earlier acts is inserted in the margin.[1] We do not cite from the later revenue acts,

[1] Federal excises during the first generation after the Constitution.

I. *Washington's administration.*

March 3, 1791, ch. 15, §§ 14, 15, on distilled spirits; not uniform or proportionate to strength. No tax on country distilleries using home made materials.

May 8, 1792, ch. 32, § 1, on distilled spirits; country distillers taxed differently from those in cities, towns and villages; § 11, no drawback on any quantity less than 100 gallons.

June 5, 1794, ch. 45, § 1, on carriages. Contains some exemptions. Discussed in *Hylton* v. *United States*, 3 Dall. 171.

June 5, 1794, ch. 48, on licenses for making certain sales of wines or foreign distilled spirituous liquors.

June 5, 1794, ch. 51, §§ 1, 2, on snuff and refined sugar; § 14, no drawback on any quantity less than $12 worth. Discussed in *Pennington* v. *Coxe*, 2 Cranch, 33.

June 9, 1794, ch. 65, § 1, on auction sales; with exemption of judicial sales, sales of goods distrained or in insolvency; and of sales of produce of land, when sold on the land where produced, etc.; and of sales "of any farming utensils, stock or household furniture by persons removing from the place of their former residence, where the amount . . . shall not exceed $200."

March 3, 1795, ch. 43, § 1, on mortars and pestles, etc., in snuff mills; § 8, no drawback on any exports of snuff less than 300 lbs.

May 28, 1796, ch. 37, § 1, on carriages, with exemptions.

II. *Period of war of* 1812.

July 24, 1813, ch. 21, § 1, on refined sugar.

July 24, 1813, ch. 24, § 1, on carriages, with exemptions.

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because of the numerous and familiar instances of such legislation which abound therein.

The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 558.

The paralysis which the Articles of Confederation produced upon the Continental Congress because of the want of power in that body to enforce necessary taxation to sustain the government needs no more than statement. And the proceedings of the Congress during the Confederation afford abundant evidence of the constant effort which was made to overcome this situation by attempts to obtain authority from the States for Congress to levy the taxes deemed by it essential, and thus relieve it from the embarrassment occasioned by the fact that all demands for revenue depended for fulfillment wholly upon the action of the respective States. Despite the constant agitation as to the subject and the abundant discussions which took place

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July 24, 1813, ch. 25, § 1, on licenses for distilling liquors.

July 24, 1813, ch. 26, § 1, on auction sales; ¼ of one per cent on sales of vessels; one per cent on other sales of goods, etc., with exemptions.

August 2, 1813, ch. 39, § 4, on licenses for retailing wines, etc.; one rate for cities, towns and villages, another for the country.

August 2, 1813, ch. 53, §§ 1, 2, on bank notes, etc., graduated but not ad valorem; commutable at 1½ per cent on dividends.

December 15, 1814, ch. 12, § 1, on carriages, graduated but not ad valorem.

December 21, 1814, ch. 15, § 1, on distilled spirits.

December 23, 1814, ch. 16, § 1, on auction sales; § 3, on retailers' licenses.

January 18, 1815, ch. 22, § 1, on domestic manufactures. Various specific and ad valorem rates, with exemptions, as umbrellas under $2, boots under $5 a pair.

January 18, 1815, ch. 23, § 1, on household furniture kept for use (annual duty) with minimum of $200, graduated but not ad valorem. The unit is the family; § 13, exemption of books, etc.; § 14, exemption of certain charitable, religious or literary institutions.

February 27, 1815, ch. 61, on plate.

April 19, 1816, ch. 58, § 4, on licenses for distilling liquors.

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in relation to it during the period of the Confederation, in the whole of the proceedings not a word can be found which can give rise to even the suggestion that there was then any thought of restraining the taxing power with reference to the intrinsic operation of a tax upon individuals. On the contrary, the sole and the only question which was ever present and in every form was discussed, was the operation of any taxing power which might be granted to Congress upon the respective States; in other words, the discrimination as regards States which might arise from a greater or lesser proportion of any tax being paid within the geographical limits of a particular State.

The proceedings of the Continental Congress also make it clear that the words "uniform throughout the United States," which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity and as synonymous with the expression, "to operate generally throughout the United States." The foregoing situation so thoroughly permeated all the proceedings of the Continental Congress that we might well rest content with their mere statement. We shall, however, make a few references on the subject.

The view that intrinsic uniformity was not then conceived is well shown by remarks by Mr. Wilson upon a proposition submitted by him to the Continental Congress on March 18, 1783, (5 Ell. Deb. 67,) that Congress be empowered to lay and impose "a tax of one quarter of a dollar per hundred acres on all located and surveyed lands within each of the States." He said, speaking of the proposed tax, "that it was more moderate than had been paid before the Revolution, and it could not be supposed the people would grudge to pay, as the price of their liberty, what was formerly paid to their oppressors."

As early as February, 1781, a resolution was proposed authorizing Congress to levy certain taxes and duties, which resolution contained the proviso, "and the same articles shall bear the same duty and impost throughout the said States without exemption." 1 Ib. p. 92.

Though this resolution failed of passage, a report of the committee of the whole was agreed to on the same day, in the form

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of a resolution recommended to the several States to levy for the use of the United States a duty of 5 per cent upon imports, with certain exceptions, and a duty of 5 per cent upon all prizes and prize goods. As late as December, 1782, however, some of the States had failed to comply with this resolution. 5 Ell. Deb. 13.

On January 25, 1783, (5 Ib. 31,) a resolution was proposed declaring that Congress would "make every effort in their power to obtain, from the respective States, *general* and substantial funds adequate to the object of funding the whole debt of the United States;" . . . The word "general" was stricken out, because susceptible of being considered as implying that every object of taxation within the States should be embraced. That is to say, in order to remove any impression that the word "general" might imply the obligation to levy on all articles, the phraseology of the previous resolution was changed so as to cause the word to have merely a geographical significance, viz., to require that whatever subject of taxation was assessed, the same subject should be taxed in every State, or, in other words, that the particular tax should operate generally throughout the United States. Two days later, a new resolution having been introduced declaring it to be the opinion of Congress that *general* funds should be established, to be collected by Congress, the same objection was repeated, (Ib. 34,) and the proposition was amended so as to read "establishment of permanent and adequate funds to operate generally throughout the United States." There being controversy as to whether Congress should be allowed to collect the taxes, (Ib. 34,) the debates record the following proceedings:

"On the motion of Mr. Madison, the whole proposition was new modelled, as follows:

"'That it is the opinion of Congress that the establishment of permanent and adequate funds, *to operate generally throughout the United States*, is indispensably necessary for doing complete justice to the creditors of the United States, for restoring public credit, and for providing for the future exigencies of the war.'

"The words 'to be collected under the authority of Congress' were, as a separate question, left to be added afterwards."

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Mr. Madison, after commenting on the demerits of the plans just referred to, prefaced his subsequent remarks with the following (Ib. p. 36): "It remains to examine the merits of a plan of general revenue *operating throughout the United States*, under the superintendence of Congress."

On March 11, 1783, (5 Ell. Deb. 64), a vote was taken upon three questions, the first being: "Shall any taxes, *to operate generally throughout the States*, be recommended by Congress, other than duties on foreign commerce?" The matter culminated on April 18, 1783, in the adoption of a resolution by nine States, recommending to the several States that Congress be vested with the power to levy, for the use of the United States, certain duties, as well specific as ad valorem, upon goods imported into the States from any foreign port, island or plantation. (1 Ell. Deb. 93.)

In an address which submitted the resolution to the States it was observed (Ib. 97):

"To render this fund as productive as possible, and, at the same time, to narrow the room for collusions and frauds, it has been judged an improvement of the plan to recommend a liberal duty on such articles as are most susceptible of a tax according to their quantity, and are of most equal and general consumption; leaving all other articles, as heretofore proposed, to be taxed according to their value."

It was also stated in the address that "to bring this essential resource (a tax on imposts) into use . . . a concerted *uniformity* was necessary;" and "that this *uniformity* cannot be concerted through any channel so properly as through Congress."

Thus it is apparent that the expression "uniform throughout the United States" was at that time considered as purely geographical, as being synonymous with the expression "general operation throughout the United States," and that no thought of restricting Congress to intrinsic uniformity obtained, since the powers recommended were absolutely in conflict with such theory.

The reasons advanced by those who opposed the various resolutions to which we have referred are, if anything, more deci-

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sive than are the matters to which we have called attention. Those reasons were predicated upon the inequality among the States which might arise from the granting to Congress the power to lay duties, imposts and excises. That is, if a particular article was levied on generally throughout the various States by an excise or duty, as a greater quantity of that article might be found in one State than in other States, it was asserted the burden would be unequal because the former State would pay a greater proportion of the tax. This form of objection is well illustrated by what was said by Mr. Rutledge and Mr. Lee against the grant of power to Congress to lay duties or excises, to operate generally throughout the United States. We quote from 5 Ell. Deb. p. 34, as follows:

"Mr. Rutledge objected to the term '*generally*,' as implying a degree of *uniformity* in the tax which would render it unequal. He had in view, particularly, a land tax, according to quality, (quantity? See note, p. 37,) as had been proposed by the office of finance.

* * * * * * * *

"Mr. Lee seconded the opposition to the term 'general.' He contended that the States would never consent to a uniform tax, because it would be unequal."

Again (Ib. p. 37) Mr. Rutledge complained "that those who so strenuously urged the necessity and competency of a general revenue, operating throughout all the United States at the same time, declined specifying any general objects from which such a revenue could be drawn." And the same reason was urged for refusing the authority to lay imposts throughout the United States, as is shown by the objections made, to which we shall now refer. Thus, with respect to duty on imported salt, it was argued that it would bear injuriously on the eastern States "on account of salt consumed in the fisheries, and that besides it would be injurious to the national interest by adding to the cost of fish." 5 El. Deb. 61. So, also, Rhode Island protested against the grant of the power to impose duties recommended by the resolution of April 18, 1783, previously referred to, on the ground "that the proposed duty would be unequal in its operation, bearing hardest upon the most commercial States,

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and so would press peculiarly hard upon that State which draws its chief support from commerce." 1 El. Deb. 101. And the nature of this objection caused it to come to pass that in the subsequent discussions in Congress, the claim that it was essential to confer upon Congress the authority to lay duties, imposts and excises to be uniform throughout the United States, became associated in the discussion with the asserted necessity that Congress should have the power to establish uniform regulations of commerce to prevent the discrimination resulting from the laying of duties, imposts and excises by the respective States. 1 Ib. 112. The association of the two subjects evolved by their natural relation is well shown by a resolution of Mr. Madison, introduced in the Virginia house of delegates in 1784, (Ib. 114,) "wherein it was proposed that the delegates from the State of Virginia should be instructed to propose in Congress a recommendation to the States in Union, to authorize that assembly to regulate their trade," on principles and under qualifications stated in the following paragraphs:

"1st. That the United States in Congress assembled be authorized to prohibit vessels belonging to any foreign nation from entering any of the ports thereof, or to impose any duties on such vessels and their cargoes which may be judged necessary; all such prohibitions and duties to be *uniform throughout the United States*, and the proceeds of the latter to be carried into the treasury of the State within which they shall accrue.

"2d. That no State be at liberty to impose duties on any goods, wares or merchandise, imported, by land or by water, from any other State, but may altogether prohibit the importation from any State of any particular species or description of goods, wares or merchandise, of which the importation is at the same time prohibited from all other places whatsoever."

It will be noticed that the words "uniform throughout the United States" are the same which were subsequently adopted in the clause of the Constitution under consideration, and that the term uniformity, in the resolution of Mr. Madison, was applied not only to duties, but to *regulations and prohibitions respecting external commerce*, which were designed to be *the same* all over the Union.

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Though the resolution of Mr. Madison was not adopted, it led to the sending by Virginia of commissioners to Annapolis to meet commissioners from the other States, the result of which meeting was the Federal convention of 1787.

Considering the proceedings of the convention, the same observation is pertinent which we have previously made as to the Continental Congress, viz., that, despite the struggles and controversies which environed the final adoption of the Constitution, not a single word is found in any of the debates, or in any of the proceedings or historical documents cotemporaneous and concurrent with the adoption of the Constitution, which give the slightest intimation that any suggestion was ever made that the grant of power to tax was considered from the point of view of its operation upon the individual. The struggles which were flagrant in the Continental Congress were transferred to the convention. The question of the undue proportion of taxation which might fall upon one or more States if direct taxes were laid was solved by the principle of apportionment of direct taxes, duties, imposts and excises, which were only subjected to the requirement of uniformity throughout the United States, these words, as we have shown, having acquired at that time an unquestioned meaning.

Without going into minute detail, the mention of a few salient particulars will serve to show how the result of the convention brought together the provisions as to the uniformity of duties, imposts and excises throughout the United States and the restriction against discriminating commercial regulations by Congress, just as they had by the force of circumstances been drawn together in the Continental Congress, and how their solution in the Constitution was substantially in accord with the resolution of Mr. Madison, introduced into the Virginia house of delegates, to which we have referred.

The draft of a Federal Constitution, submitted to the convention by Mr. Pinckney, provided in the first and second paragraphs as follows (5 Ell. Deb. 130):

"Art. VI. The legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises;

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"To regulate commerce with all nations and among the several States;

* * * * * * * *

"The proportion of direct taxation shall be regulated by the whole number of inhabitants of every description; which number shall, within — years after the first meeting of the legislature, and within the term of every — year after, be taken in the manner to be prescribed by the legislature.

"No tax shall be laid on articles exported from the States; nor capitation tax, but in proportion to the census before directed."

No other provision was made respecting taxation.

The plan of Mr. Paterson, of New Jersey, provided, in addition to the powers vested in Congress by the Articles of Confederation, (p. 191,) that Congress should be authorized "to pass acts for raising a revenue, by levying a duty or duties on all goods and merchandise of foreign growth or manufacture, imported into any part of the United States; by stamps on paper, vellum or parchment, and by a postage on all letters and packages passing through the general post office—to be applied to such Federal purposes as they shall deem proper and expedient; to make rules and regulations for the collection thereof; and the same from time to time to alter and amend, in such manner as they shall think proper; to pass acts for the regulation of trade and commerce, as well with foreign nations as with each other."

By another section of the Paterson plan, it was provided that whenever requisitions upon the States should be necessary, they should be made by the rule of numbers and not by value of land, as under the Confederation; and the Congress was to be authorized "to devise and pass acts" directing and authorizing the collection of requisitions when not complied with. It is thus seen that both of the plans referred to made no provision for uniformity of taxation in the sense contended for by the opponents of the tax now under consideration. The committee of detail, in the first section of article VII of their draft of a proposed constitution, reported the two clauses of the plan of Mr. Pinckney first quoted, substituting the word "foreign"

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for the word "all" before the word "nations." 5 Ell. Deb. 378.

On August 25, 1787, the following occurred (Ib. 478):

"Mr. Carroll and Mr. L. Martin expressed their apprehensions, and the probable apprehensions of their constituents, that, under the power of regulating trade, the general legislature might favor the ports of particular States, by requiring vessels destined to or from other States to enter and clear thereat, as vessels belonging or bound to Baltimore, to enter and clear at Norfolk, etc. They moved the following proposition:

"'The legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other State than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, *or paying duties or imposts in one State in preference to another.*'"

On the same day Mr. McHenry and General Pinckney submitted a proposition (which was referred *nem. con.* to a committee) relating to the establishment of new ports in the States for the collection of duties or imposts, which concluded as follows (p. 479):

"All duties, imposts and excises, prohibitions or restraints, laid or made by the legislature of the United States, *shall be uniform and equal* throughout the United States."

The fourth section of the seventh article of the proposed constitution reported by the committee on detail, on August 6, 1787, read as follows (p. 379):

"Sec. 4. No tax or duty shall be laid by the legislature on articles exported from any State; nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited."

The committee to whom these propositions were referred made a report on August 28, in effect embodying both propositions in one paragraph, as follows (Ib. 483):

"That there be inserted, after the fourth clause of the seventh

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section, 'nor shall any regulation of commerce or revenue *give preference to the ports of one State over those of another*, or oblige vessels bound to or from any State to enter, clear or pay duties, in another; and all *tonnage duties, imposts and excises*, laid by the legislature, *shall be uniform throughout the United States.*'"

It will be noticed that the committee recommended, not merely that preferences between ports should be forbidden by "any regulation of commerce," but also that such preferences should not be made by "any regulation of *revenue*." This, obviously, rendered it unnecessary to include, in the latter part of the clause, "prohibitions or restraints," as proposed by Mr. McHenry and General Pinckney. The substantial effect of the first clause of the paragraph was to require that all regulations of commerce *or of revenue* affecting commerce through the ports of the States should be the same in all ports.

It follows from the collocation of the two clauses that the prohibition as to preferences in regulations of commerce between ports and the uniformity as to duties, imposts and excises, though couched in different language, had absolutely the same significance. The sense in which the word "uniform" was used is shown by the fact that the committee, whilst adopting in a large measure the proposition of Mr. McHenry and General Pinckney, "that all duties, imposts, excises, prohibitions or restraints . . . shall be uniform and equal throughout the United States," struck out the words "and equal." Undoubtedly this was done to prevent the implication that taxes should have an equal effect in each State. As we have seen, the pith of the controversy during the Confederation was that even, although the same duty or the same impost or the same excise was laid all over the United States, it might operate unequally by reason of the unequal distribution or existence of the article taxed among the respective States.

On August 31, 1797, the report of the committee was acted upon as follows (5 Ell. Deb. 502): The provision, "Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another," was adopted *nem. con.* After discussion the clause, "or oblige vessels bound to or from

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any State to enter, clear or pay duties in another," was agreed to. Quoting from the debates at page 503:

"'The word 'tonnage' was struck out *nem. con.*, as comprehended in 'duties.'

"On the question on the clause of the report—'and all duties, imposts and excises, laid by the legislature, shall be uniform throughout the United States'—it was agreed to *nem. con.*"

In a foot-note, it is said:

"In the printed journal, New Hampshire and South Carolina entered in the negative."

On September 4, 1787, the committee to whom sundry resolutions, etc., had been referred on August 31, recommended, among others, the following addition and alteration to the report before the convention (pp. 506 to 507):

"1. The first clause of article 7, section 1, to read as follows: 'The legislature shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States.'

"2. At the end of the second clause of article 7, section 1, add, 'and with the Indian tribes.'"

The committee on style, on September 12, 1787, reported a plan of the Constitution, (p. 535,) the foregoing provision conferring authority to lay taxes, etc., being designated as section 8 of article 1.

On September 14, 1783, the words "But all such duties, imposts and excises shall be uniform throughout the United States," which, in their adoption had been associated with and formed but a part of the clause forbidding a preference in favor of the port of one State over the port of another State—in other words, had been a part of another clause—were shifted, by a unanimous vote, from that paragraph, and were annexed to the provisions granting the power to tax.

Thus, it came to pass that although the provisions as to preference between ports and that regarding uniformity of duties, imposts and excises were one in purpose, one in their adoption, they became separated only in arranging the Constitution for the purpose of style. The first now stands in the Constitution as a part of the sixth clause of section 7 of article 1, and the

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other is a part of the first clause of section 8 of article 1. By the result then of an analysis of the history of the adoption of the Constitution it becomes plain that the words "uniform throughout the United States" do not signify an intrinsic but simply a geographical uniformity. And it also results that the assertion to which we at the outset referred, that the decision in the *Head Money cases*, holding that the word uniform must be interpreted in a geographical sense, was not authoritative, because that case in reality solely involved the clause of the Constitution forbidding preferences between ports, is shown to be unsound, since the preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception.

We add that those who opposed the ratification of the Constitution clearly understood that the uniformity clause as to taxation imported but a geographical uniformity, and made that fact a distinct ground of complaint. Thus in the report made to the legislature of Maryland by Luther Martin, attorney general of the State, detailing and commenting upon the proceedings of the convention of 1787, of which convention Mr. Martin was a delegate, in the course of comments upon the tax clause of the Constitution Mr. Martin said (1 Ib. p. 369):

"Though there is a provision that all duties, imposts and excises shall be uniform—*that is, to be laid to the same amount on the same articles in each State*—yet this will not prevent Congress from having it in their power to cause them to fall very unequally and much heavier on some States than on others, because these duties may be laid on articles but little or not at all used in some other States, and of absolute necessity for the use and consumption in others; in which case, the first would pay little or no part of the revenue arising therefrom, while the whole or nearly the whole of it would be paid by the last, to wit, the States which use and consume the articles on which imposts and excises are laid."

Having disposed of the question of uniformity, we are next brought to consider certain contentions which relate to that subject. It is argued that even although it be conceded that

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the uniformity required by the Constitution is only a geographical one, the particular law in question does not fulfill the requirements of even geographical uniformity, since it does not apply to the District of Columbia. We think this contention is without merit.

The proposition is predicated upon the fact that the statute purports to lay the tax upon legacies and distributive shares "passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory;" and provides that the receipt for the tax will entitle an administrator, etc., to credit to the amount of the payment made to the collector "by any tribunal which, by the laws of any State or Territory, is, or may be, empowered to decide and settle the accounts of executors and administrators."

This, it is asserted, does not embrace the District of Columbia. Without attempting to determine whether the necessary construction of the statute would require the inclusion of the District of Columbia within its terms, aside from any special provision bearing upon the question, we think the provisions of section 31 of the act makes the objection untenable. That section provides as follows (30 Stat. 466):

"SEC. 31. That all administrative, special or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act."

The result of this provision is to carry into the law under review the provisions of section 3140 of the Revised Statutes, relating to internal revenue laws generally. It is as follows:

"3140. The word 'State,' when used in this title, shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out its provisions."

It is yet further asserted that the tax does not fulfill the requirements of geographical uniformity, for the following reason: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every

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State. It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the States may obtain as to the objects upon which the tax is levied. The proposition in substance assumes that the objects taxed by duties, imposts and excises must be found in uniform quantities and conditions in the respective States, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States. Indeed, the contention was substantially disposed of in the *License Tax cases*, 5 Wall. 472, previously referred to. It was there urged that, as the several States had the right to forbid the carrying on of the liquor traffic, therefore Congress had no power to license such traffic, because it would interfere with the authority of the State. It was held that the license was validly imposed, that it did not interfere with the power of the States to prevent the liquor traffic, because in a State where such traffic was forbidden the license would be inoperative; but in the States where such traffic was allowed, the license would be effective. The argument, however, is additionally fully answered by the review which we have made of the origin and meaning of the expression "uniform throughout the United States." From that review it appears that the very objection upon which the proposition now advanced must rest was urged in the Continental Congress as the reason why the levy of uniform duties, imposts and excises throughout the United States should not be authorized. This is shown by the objection of Mr. Rutledge and the suggestion of Mr. Lee. It is further shown by the protest of Rhode Island, and the reasons advanced why a duty on salt should not be levied. But it was seen that if it were required, not only that the duties, imposts and excises should be uniform throughout the United States, but that in imposing them objects should be selected existing in equal quantity in the several States, the

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grant of power to levy duties, imposts and excises would be a failure. In the convention which framed the Constitution the same argument was used without success, and, as we have seen, the only ground upon which the striking out of the words "and equal" after the word "uniform," in the adoption of the clause as now found in the Constitution, can be reasonably explained, is that it was done to prevent the implication that the duties, imposts and excises which were to be uniform throughout the United States were to be placed upon rights equally existing in the several States. To now adopt the proposition relied on would be virtually, then, to nullify the action of the convention, and would relegate the taxing power of Congress to the impotent condition in which it was during the Confederation.

Lastly, it is urged that the progressive rate feature of the statute is so repugnant to fundamental principles of equality and justice that the law should be held to be void, even although it transgresses no express limitation in the Constitution. Without intimating any opinion as to the existence of a right in the courts to exercise the power which is thus invoked, it is apparent that the argument as to the enormity of the tax is without merit. It was disposed of in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293.

The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative and not judicial. The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider

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whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory, is obvious.

It follows from the foregoing opinion that the court below erred in denying all relief, and that it should have held the plaintiff entitled to recover so much of the tax as resulted from taxing legacies not exceeding ten thousand dollars, and from increasing the tax rate with reference to the whole amount of the personal estate of the deceased from which the legacies or distributive shares were derived. For these reasons

The judgment below must be reversed and the case be remanded, with instructions that further proceedings be had according to law and in conformity with this opinion, and it is so ordered.

MR. JUSTICE BREWER dissented from so much of the opinion as holds that a progressive rate of tax can be validly imposed. In other respects he concurred.

MR. JUSTICE PECKHAM took no part in the decision.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE MCKENNA, dissenting.

While I concur in the construction placed by the court upon the clause of the Constitution declaring that all duties, imposts and excises shall be "uniform throughout the United States," I dissent from that part of the opinion construing the twenty-ninth and thirtieth sections of the Revenue Act. In my judgment, the question whether the tax presented by Congress shall or shall not be imposed is to be determined with reference to the whole amount of the personal property out of which legacies and distributive shares arise. If the value of the whole personal property held in charge or trust by an administrator, executor or trustee exceeds ten thousand dollars, then every part of it constituting a legacy or distributive share, except the share of

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a husband or wife, is taxed at the progressive rate stated in the act of Congress. I do not think the act can be otherwise interpreted without defeating the intent of Congress.

Construed as I have indicated, the act is not liable to any constitutional objection.

HIGH v. COYNE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 225 Argued December 5, 6, 7, 1899.—Decided May 14, 1900.

The assignments of error in this case raised only the constitutionality of the taxes sought to be recovered, which has just been decided adversely to the plaintiffs in error in *Knowlton* v. *Moore*, *ante*, 41, and there is nothing in the record to enable the court to see that the statute was mistakingly construed by the collector; but as the interpretation of the statute which was adopted and enforced by the officers administering the law was the one held to be unsound in *Knowlton* v. *Moore*, the ends of justice require that the right to resist so much of the tax as may have arisen from the wrong interpretation of the statute should not be foreclosed by the decree of this court.

THE complainants, who are appellants here, filed their bill to enjoin the executrix of their father's estate from paying the legacy taxes levied by sections 29 and 30 of the War Revenue Act of 1898. The collector of internal revenue was also made a defendant, and an injunction was asked against him to prevent his collecting or attempting to collect the taxes in question, which, it was asserted, he was about to enforce against the executrix, who, it was averred, would pay unless by the writ of injunction she was forbidden to do so. As heirs of their father and as beneficiaries of his estate, the complainants asserted they were entitled to prevent the executrix from making payment of taxes which were unconstitutional and hence void. The reasons relied on to show that the taxing law was repugnant to the Constitution of the United States were that the taxes were direct and not apportioned, were not uniform and were levied on ob-

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jects beyond the scope of the authority of Congress. The bill was demurred to as not stating ground for relief. The demurrers were sustained, and from a decree dismissing the suit this appeal is prosecuted.

Mr. A. M. Pence and *Mr. John G. Carlisle* for appellants. *Mr. George A. Carpenter* and *Mr. Shirley T. High* were on Mr. Pence's brief.

Mr. Solicitor General for appellees. He also filed a brief on the question submitted by the court referred to in the previous cases.

Mr. Justice White delivered the opinion of the court.

As the court below did not grant an injunction, but dismissed the bill, it is unnecessary to consider whether the right would have existed to enjoin the collector of internal revenue even had the court concluded that the averments of the bill disclosed a cause of action. Rev. Stat. 3226.

Every ground relied on to maintain that the taxes levied by sections 29 and 30 of the War Revenue Act are repugnant to the Constitution has been decided adversely in the opinion this day announced in *Knowlton* v. *Moore*.

This disposes of this case, as the assignments of error raised only the constitutionality of the taxes, and there is nothing in the record to enable us to see that the statute was, by the collector, mistakingly construed.

As, however, the interpretation of the statute, which was held to be unsound in No. 387, was the one which was adopted and enforced by the officers charged with the administration of the law, the impression naturally arises that such erroneous construction must have been applied in assessing the tax in controversy. The ends of justice therefore require that the right to resist so much of the tax as may have arisen from the wrong interpretation of the statute above referred to be not foreclosed by our decree.

Decree affirmed, without prejudice to any such right.

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FIDELITY INSURANCE TRUST AND SAFE DEPOSIT COMPANY *v.* McCLAIN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 451. Argued and submitted December 5, 6, 7, 1899.—Decided May 14, 1900.

The judgment in *High* v. *Coyne*, *ante*, 111, is followed in this case.

THE case is stated in the opinion.

Mr. Richard C. Dale for plaintiff in error. *Mr. Dale*, *Mr. Samuel Dickson* and *Mr. John C. Bullitt* filed a supplemental brief for plaintiff in error under the order of court of February 26, 1900.

Mr. Solicitor General for defendant in error. He also filed an additional brief under the order of court.

MR. JUSTICE WHITE delivered the opinion of the court.

This action was begun in the Court of Common Pleas for the county of Philadelphia, State of Pennsylvania, to recover from the defendant, a collector of internal revenue, the sum of $168.75, with interest, being the amount of an assessment made by the defendant under the authority of sections 29 and 30 of the War Revenue Act of June 30, 1898, which we have just considered. The statement of claim filed on behalf of the plaintiff contained an averment of the amount of the tax paid, without any particular description of the mode in which it had been levied. It was averred that the payment of the tax had been made under protest, and because of threats to distrain, etc. It was also further stated that an application for refunding had been refused, and judgment was prayed for the amount of the tax. The demand was based solely on the ground of the unconstitutionality of the statute, which was asserted to exist, because the tax was direct

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and had not been apportioned, and, if not direct, was wanting in uniformity.

The cause was removed into the Circuit Court of the United States for the Eastern District of Pennsylvania. The defendant demurred on the ground that no cause of action was stated, and the demurrer was sustained. A judgment having been entered in favor of the defendant, the present writ of error was prosecuted.

The record contains the protest made at the time of the payment of the tax and the petition for refunding. Both of these documents disclose that the sole ground urged against the assessment and collection of the tax was the unconstitutionality of the statute in the particulars above mentioned. This constitutional objection, as we have already said, was the only ground alleged in the statement of the case. The assignment of errors here made also confines the issue solely to the constitutional questions already referred to. There is nothing in the record to show the amount of the estate, the legacies or distributive shares therein, or upon what basis the collector proceeded in assessing the tax. It contains therefore nothing from which it can be said that if the law under which the tax was laid be constitutional, an excessive tax was imposed. In *Knowlton* v. *Moore*, No. 387 of this term, *ante*, 41, it was held that the law in question was constitutional. As, however, the interpretation of the statute which was held to be unsound in No. 387 was the one which was adopted and enforced by the officers charged with the administration of the law, the impression naturally arises that such erroneous construction may have been applied in assessing the tax in controversy. The ends of justice therefore require that the right to relief as to so much of the tax, if any, as may have arisen from the wrong interpretation of the statute above referred to, be not foreclosed by our judgment.

Judgment affirmed, without prejudice to the right to any such relief.

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PLUMMER v. COLER.

ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

No. 489. Argued February 27, 28, 1900. — Decided May 14, 1900.

The right to take property by will or descent is derived from and regulated by municipal law; and, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the state tax, or the law under which it is imposed.

The relation of the individual citizen and resident to the State in which he resides is such that his right, as the owner of property, to direct its descent by will or permit its descent to be regulated by statute, and his right as legatee, devisee or heir to receive the property of his testator or ancestor, are rights derived from and regulated by the State; and no sound distinction can be drawn between the power of the State, in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents.

Joseph Plummer, a citizen and resident of New York, died October 28, 1898, leaving a last will whereby he bequeathed to Harry Plummer, his executor, forty thousand dollars in United States bonds, issued under the Funding Act of 1870, in trust, to hold the same during the lifetime of Ella Plummer Brown, daughter of the testator, and to pay the income thereof to her during her life, and at her death to divide the same between and amongst her issue then living.

The value of this life interest was computed by the appraisers at the sum of $16,120, and a tax of $161.20 was imposed thereon by the surrogate of the county of New York. From this appraisal and the order imposing the tax an appeal was taken to the Surrogate's Court of the county and State of New York, where the following stipulation was filed:

"It is stipulated and agreed by and between the attorneys for the respective parties to the above-entitled proceedings that

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the forty thousand dollars in amount at par of bonds of the United States of America, of which the said Joseph Plummer died possessed, and upon the interest in which of Ella Plummer Brown a tax of $161.20 was fixed, assessed and determined by the order appealed from, consist of four per cent bonds issued in the year 1877 and due in the year 1907, under and by virtue of and pursuant to the statute of the United States, passed July 14, 1870, entitled 'An act to authorize the refunding of the national debt,' which authorized the Secretary of the Treasury, among other things, to issue various classes of bonds in the sums therein mentioned, including 'a sum or sums not exceeding in the aggregate one thousand million dollars of like bonds, . . . payable at the pleasure of the United States after thirty years from the date of their issue, and bearing interest at the rate of four per cent per annum; all of which said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal or local authority; and the said bonds shall have set forth and expressed upon their face the above specified conditions;' and that pursuant to said statute there is set forth on the face of each of said bonds the following clause, that is to say: 'The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal or local authority.'"

On December 22, 1899, the Surrogate's Court affirmed the appraisal and the order imposing a tax. Thereupon Harry Plummer, executor, appealed to the appellate division of the Supreme Court of the State of New York, which court on January 5, 1900, affirmed the order of the surrogate and the decree of the Surrogate's Court. From this decree of the appellate division of the Supreme Court an appeal was taken to the Court of Appeals of the State of New York, where, on January 8, 1900, the proceedings and order of the surrogate and the decree of the appellate division were affirmed.

In the notice of appeal to the Surrogate's Court and in that of the appeal to the Court of Appeals the grounds of appeal were stated to be the invalidity of the statute of New York pur-

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porting to impose a tax upon a transfer by legacy of bonds of the United States, and the invalidity of the statute of the State of New York and of the authority exercised thereunder by the appraiser and the surrogate, in so far as United States bonds were concerned. And the appellant specially set up and claimed a title, right, privilege and immunity under the Constitution of United States, and under the statute of the United States in respect to the exemption of said bonds from state taxation in any form.

On January 9, 1900, a writ of error was sued out from this court.

Mr. William V. Rowe and *Mr. Treadwell Cleveland* for plaintiff in error.

Mr. Jabish Holmes, Jr., and *Mr. Edgar J. Levey* for defendant in error.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

In this case we are called upon to consider the question whether, under the inheritance tax laws of a State, a tax may be validly imposed on a legacy consisting of United States bonds issued under a statute declaring them to be exempt from state taxation in any form.

It is not open to question that a State cannot, in the exercise of the power of taxation, tax obligations of the United States. *Weston* v. *Charleston*, 2 Pet. 449; *Bank of Commerce* v. *New York City*, 2 Black, 620; *Home Insurance Co.* v. *New York*, 134 U. S. 594, 598.

So, likewise, it is settled law that bonds issued by a State, or under its authority by its public municipal bodies, are not taxable by the United States. *Mercantile Bank* v. *New York*, 121 U. S. 138; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 583.

The reasoning upon which these two lines of decision proceed is the same, namely, as was said by Mr. Justice Nelson in *Col-*

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lector v. *Day*, 11 Wall. 113, 124: "The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States;" and, as was said by Mr. Chief Justice Fuller, in *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 537: "As the States cannot tax the powers, the operations or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."

As, then, for the reasons advanced and applied in the previous cases, it is not within the power of a State to tax Federal securities, it was not necessary for Congress, in order to secure such immunity, to declare in terms, in the act of July 14, 1870, and on the face of the bonds issued thereunder, that the principal and interest were exempt from taxation in any form by or under state, municipal or local authority. Such a declaration did not operate to withdraw from the States any power or right previously possessed, nor to create, as between the States and the holders of the bonds, any contractual relation. It doubtless may be regarded as a legitimate mode of advising purchasers of such bonds of their immunity from state taxation, and of manifesting that Congress did not intend to waive this immunity, as it had done in the case of national banks, which are admittedly governmental instrumentalities.

With these concessions made, we are brought to the pivotal question in the case, and that question is thus presented in the second point discussed in the brief filed for the plaintiff in error. "If the question of the right of the State to impose the tax now in question be considered merely with reference to the inherent lack of power of the State to impose such a tax, because of the provisions of the Constitution of the United States bearing upon

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that question, without any aid from the statute of the United States under which these bonds were issued, or the exemption clause contained in the bonds, we conceive it to be entirely clear that the tax in question is unconstitutional, because impairing and burdening the borrowing power of the United States." Or, as stated elsewhere in the brief: "The States have no power to impose any tax or other burden which would have the effect to prevent or hinder the government of the United States from borrowing such amounts of money as it may require for its purposes, on terms as beneficial and favorable to itself, in all respects, as it could do if no such tax were imposed by the State."

It will be observed that these propositions concede that the tax law of the State of New York in question does not expressly, or by necessary implication, propose to tax Federal securities. It is only when and if, in applying that law to the estates of decedents, such estates are found to consist wholly or partly of United States bonds, that the reasoning of the plaintiff in error, assailing the validity of the statute, can have any application. And the contention is that individuals, in forming or creating their estates, will or may be deterred from offering terms, in the purchasing of such bonds, as favorable as they otherwise might do, if they are bound to know that such portion of their estates as consists of such bonds is to be included, equally with other property, in the assessment of an inheritance tax.

Before addressing ourselves directly to the discussion of these propositions we shall briefly review the decisions in whose light they must be determined.

And, first, what is the voice of the state courts?

A detailed examination of the state decisions is unnecessary, because it is admitted, in the brief of the plaintiff in error that in many, if not in most, of the States of the Union inheritance or succession tax laws, similar to the New York statute in question, are and have been long in operation, and that the question of their validity, in cases like the present, has always heretofore been determined by the state courts against the United States. We cannot, however, accede to the suggestion in the brief that

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the state decisions are entitled to but little consideration, for the reason that "they are the determinations of a distinct sovereignty, adjudicating upon the rights of the nation, and naturally jealous of their own." Undoubtedly, in a case like the present, the national law is paramount, and its final exposition is for this court. Still, for reasons too obvious to require statement, the decisions of the state courts, particularly if they are uniform and concur in their reasoning, are worthy of respectful consideration, even if the question be, at last, a Federal one.

Without attempting a rehearsal of the state decisions, we may profitably examine the reasons and conclusions of several of the leading state courts.

A statute of Massachusetts of 1862 provided that every institution for savings, incorporated under the laws of that State, should pay a tax on account of its depositors, on the average amount of its deposits. The Provident Institution of Savings, a corporation having no property except its deposits and the property in which they were invested, and authorized by the general statute of Massachusetts to receive money on deposit and to invest its deposits in securities of the United States, had on deposit on the 1st day of May, 1865, $8,047,652—of which $1,327,000 stood invested in public funds of the United States exempt by law of the United States from taxation under state authority. The company declined to pay that portion of the tax on its property invested in United States bonds. On suit brought by the Commonwealth to recover the same, the Supreme Judicial Court of Massachusetts, regarding the tax as one on franchise, and not on property, held the tax to be lawful. *Commonwealth* v. *Provident Institution*, 12 Allen, 312.

By a subsequent statute of 1864, c. 208, corporations having capital stock divided into shares were required to pay a tax of a certain percentage upon "the excess of the market value" of all such stock over the value of its real estate and machinery. The Hamilton Manufacturing Company refused to pay the tax upon that portion of its property which was invested in United States securities, because, by the act of Congress authorizing their issue, they were exempt from taxation by state authority.

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It was held by the Supreme Judicial Court of Massachusetts that the tax was to be regarded as a tax on the franchise and privileges of the corporation, and was lawful so far as related to Federal securities. *Commonwealth* v. *Hamilton Company*, 12 Allen, 298, 300.

The legislature of Connecticut in 1863 enacted that the savings banks in the State should annually pay to the treasurer of the State a sum equal to three fourths of one per cent on the total amount of deposits. The "Society for Savings," a corporation of Connecticut, refused to pay the tax upon that portion of its deposits which was invested in United States bonds, declared by act of Congress to be exempt from taxation by state authority.

On a suit brought by Coite, treasurer of the State, to recover the tax thus withheld, the Supreme Court of Connecticut decided that the tax in question was not a tax on property, but on the corporation as such, and rendered judgment accordingly for the plaintiff. *Coite* v. *Savings Bank*, 32 Conn. 173.

In Pennsylvania it has been repeatedly held that the collateral inheritance law of that State, imposing a tax upon the total amount of the estates of decedents, is valid, although the estate may consist in whole or in part of United States bonds; and this upon the principle that what is called a collateral inheritance tax is a bonus, exacted from the collateral kindred and others, as the conditions on which they may be admitted to take the estate left by a deceased relative or testator; that the estate does not belong to them, except as a right to it is conferred by the State; that the right of the owner to transfer it to another after death, or of kindred to succeed, is the result of municipal regulation, and must, consequently, be enjoyed subject to such conditions as the State sees fit to impose. *Strode* v. *Commonwealth*, 52 Penn. St. 181; *Clymer* v. *Commonwealth*, 52 Penn. St. 181, 186.

In Virginia the highest court of the State has construed a similar statute as imposing the tax, not upon the property, but upon the privilege of acquiring it by will or under the intestate laws. *Eyre* v. *Jacob*, 14 Grat. 422; *Miller* v. *Commonwealth*, 27 Grat. 110.

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Opinion of the Court.

The Supreme Court of Illinois has held valid a statute of that State, entitled "An act to tax gifts, legacies and inheritances in certain cases, and to provide for the collection of the same." Rev. Stat. Ill. 1895, c. 120. The constitutionality of the act was denied, because of the alleged want of reasonableness in its classification of those subject to the tax and the want of equality in the amounts imposed. But the Supreme Court held that an inheritance tax is a tax not upon property, but on the succession, and that the right to take property by devise or descent is the creature of the law, a privilege, and that the authority which confers the privilege may impose conditions upon it. *Kochersperger* v. *Drake*, 167 Illinois, 122.

By an act of the legislature of New York, Laws of 1881, c. 361, p. 481, it was enacted that "every corporation, joint stock company or association whatever, now or hereafter incorporated or organized under any law of this State, . . . shall be subject to and pay a tax, as a tax upon its corporate franchise or business, into the treasury of the State, annually, to be computed as follows: If the dividends made or declared by such corporation, joint stock company or association during any year ending with the first day of November amount to more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one quarter mill upon the capital stock for each one per centum of dividend so made or declared," etc.

The Home Insurance Company, a corporation of the State of New York, having a capital stock of $3,000,000, declared a dividend of ten per cent for the year 1881. During the year 1881 the company had part of its capital invested in United States bonds, exempt from state taxation. The amount so invested changed from $3,300,000 to $1,940,000 in such bonds during the year 1881. The company, in tendering payment of its tax, claimed that so much of the laws of New York as required a tax to be paid upon the capital stock of the company, without deducting from the amount so to be paid that part invested in bonds of the United States, was unconstitutional and void. In an action brought to recover such unpaid portion of the tax, the Supreme Court of New York, at general term, ad-

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judged that the company was liable to pay such tax; and this judgment was affirmed by the Court of Appeals. The view of those courts was that, the tax being upon the franchise of the company, it mattered not how its capital stock or property may be invested, whether in United States securities or otherwise. *N. Y. & Home Insurance Co.* v. *New York*, 92 N. Y. 328.

In *Monroe Savings Bank* v. *Rochester*, 37 N. Y. 365, it was said:

"It is true that where a tax is laid upon the property of an individual or a corporation, so much of their property as is vested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist, but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed. It is, however, argued with great ingenuity and skill that, inasmuch as the plaintiffs, among other powers given them, have the right to invest their moneys in United States bonds, their franchises and privileges cannot be taxed by the State. The power thus to invest their money, it is contended, is a franchise for lending to the United States, and therefore cannot be taxed, because such taxation would trench on the power of the United States to borrow. This is stretching the argument too far. It cannot be pretended that the State would violate any obligation resulting from the power of the United States to borrow money, if the law conferring the power upon the plaintiff to invest their money in United States stocks and bonds were repealed. The State is under no obligation, express or implied, to legislate to enhance the credit of the general government, and should it adopt a system of legislation which indirectly produces such a result, its power of repeal cannot be doubted. The position, that a franchise granted by the bounty of the State is not taxable, because coupled with that franchise is the privilege of loaning money to the general government, is not more untenable than to argue that, because such a franchise enhances the credit of the United States, therefore the legislature could not repeal the law granting the franchise without violating its constitutional obligation. Suppose the legislature had limited the amount in which the plaintiff

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could invest its money in the securities of the United States, it will not be contended that such limitation would be void because it impaired the power of the United States to borrow money. It must, therefore, be regarded as sound doctrine to hold that the State, in granting a franchise to a corporation may limit the powers to be exercised under it, and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the grantee accepts the boon it must bear the burden."

In *Matter of Sherman*, 153 N. Y. 1, it was said by the Court of Appeals of New York, per Chief Judge Andrews, that—

"This court has not been called upon to consider the question of the power of the State to prescribe that in ascertaining the value of the property of a decedent for the purpose of fixing the tax, under the collateral inheritance or transfer tax laws, the value of Federal securities owned by the decedent shall be included. But we apprehend that the existence of the power cannot be denied upon reason or authority. The tax imposed is not, in a proper sense, a tax upon the property passing by will, under the statutes of descents or distribution. It is a tax upon the right of transfer by will, or under the intestate law of the State. Whether these laws are regarded as a limitation on the right of a testator to dispose of property by will, or upon the right of devisees to take under a will, or the right of heirs or next of kin to succeed to a property of an intestate, is immaterial. The so-called tax is an exaction made by the State in the regulation of the right of devolution of property of decedents, which is created by law, and which the law may restrain or regulate. Whatever the form of the property, the right to succeed to it is created by law, and if the property consists of government securities, the transferee derives his right to take them as he does his right to take any other property of the decedent, under the laws of the State, and the State by these statutes makes the right subject to the burden imposed."

And in the case in hand, the very matter of complaint is that the courts of the State of New York held that, under the laws of that State, an inheritance tax can be validly assessed

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against the entire estate of a decedent, although composed in greater part of United States bonds; and the language of the surrogate, affirmed by the Court of Appeals, was as follows:

"It is almost unnecessary to state that the theory on which the courts have held this kind of security taxable is that the tax is not upon the bonds themselves, but upon the transfer thereof. This distinction is firmly established in this State. See, besides the *Sherman case*, *Matter of Merriam*, 141 N. Y. 479; *Matter of Bronson*, 150 N. Y. 1; and it seems to have been recognized in the Supreme Court of the United States, 163 U. S. 625, *United States* v. *Perkins*, in which *Matter of Merriam* was affirmed."

The decisions of the state courts may be summarized by the statement that it is competent for the legislature of a State to impose a tax upon the franchises of the corporations of the State, and upon the estates of decedents resident therein, and in assessing such taxes and as a basis to establish the amount of such assessments, to include the entire property of such corporations and decedents, although composed, in whole or in part, of United States bonds; and that the theory upon which this can be done consistently with the Constitution and laws of the United States is that such taxes are to be regarded as imposed, not upon the property, the amount of which is referred to as regulating the amount of the taxes, but upon franchises and privileges derived from the State.

Let us now proceed to a similar survey of the Federal authorities on this subject.

Mager v. *Grima*, 8 How. 490, was a case where, by the law of Louisiana, a tax of 10 per cent was imposed on legacies, when the legatee is neither a citizen of the United States nor domiciled in that State, and the executor of the deceased or other person charged with the administration of the estate was directed to pay the tax to the state treasurer. Felix Grima was the executor of John Mager, and retained the amount of the tax in order to pay it over as the law directed. Suit was brought by a legatee to recover it, upon the ground that the act of Louisiana was repugnant to the Constitution of the United States. The validity of the act was sustained by

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the state courts, and the cause was brought to this court. The judgment of the state courts was here affirmed, and it was said, in the opinion delivered by Chief Justice Taney:

"Now the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take, either real or personal property, situated within its limits either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given to the alien, subject to a deduction of ten per cent for the use of the State."

In *Van Allen* v. *The Assessors*, 3 Wall. 573, it was held that it was competent for Congress to authorize the States to tax the shares of banking associations organized under the act of June 3, 1864, without regard to the fact that a part or the whole of the capital of such association was invested in national securities declared by the statutes authorizing them to be "exempt from taxation by or under state authority." This decision has ever since been acted upon, and its authority has never been questioned by any court, and from it we learn that there is no undeviating policy that, at all times and in all circumstances, the tax system of the States shall not extend to Federal securities.

The next cases to be noted are: *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Insurance Co.* v. *Massachusetts*, 6 Wall. 611; and *Hamilton Company* v. *Massachusetts*, 6 Wall. 632.

In these cases this court affirmed the Supreme Courts of Connecticut and Massachusetts in holding that state taxes may be imposed, the amount of which may be determined by the ag-

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gregate amount of the property or capital stock of banking and manufacturing companies, even if such property or capital stock includes United States bonds issued under a statute declaring them exempt from taxation under state authority.

As we have already seen, when referring to the state decisions, the reasoning upon which the state courts proceeded in the case of corporations was that such taxes were to be deemed as laid, not upon the bonds as property, but upon the franchise to do business as a corporation or association derived from the State. This reasoning was approved by this court; and it may be observed in passing that, as appears in the reports of the arguments of counsel, the contention so strongly pressed in the present case, namely, that under no form can Federal securities be practically rendered by state legislation less valuable, was fully argued. See also the case of *Scholey* v. *Rew*, 23 Wall. 331.

Next worthy of notice is the case of *Home Insurance Company* v. *New York*, 134 U. S. 594. It came here on error to the Supreme Court of the State of New York, whose judgment had been affirmed by the Court of Appeals, and was twice argued. The question considered was whether a statute of the State of New York was valid in respect to imposing a tax upon a New York corporation, measured and regulated by the amount of its annual dividends, where those dividends were partly composed of interest of United States bonds owned by the corporation.

As we have heretofore stated, the state courts answered this question in the affirmative, basing their decision upon the proposition that the tax was imposed as a tax upon corporate franchises or privileges, and that such a tax was not invalidated by the circumstance that the measure of its amount was fixed by the amount of the annual dividends of the company partly derived from the interest of United States bonds. 92 N. Y. 328.

In this court the question was elaborately argued, as may be seen in the first report of the case in 119 U. S. 129; and it was again contended that the case fell within the principle of public policy that the States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the opera-

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tions of the instrumentalities of the national government, and also that the tax in question was repugnant to the Fourteenth Amendment of the Constitution of the United States.

The reasoning of the state court was substantially approved and their judgment, sustaining the validity of the state statute was affirmed. Some of the observations of the opinion of the court, delivered by Mr. Justice Field, may be appropriately quoted:

"Looking now at the tax in this case, we are unable to perceive that it falls within the doctrine of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statutes designate it a tax upon the 'corporate franchise or business' of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

"By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege, by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business, and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be

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ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year, which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is not exempt from taxation. . . . The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed, and put into real property or bonds of New York, or of other States. From the very nature of the tax, being laid upon a franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the State over the corporate franchise and the conditions upon which it shall be exercised is as ample and plenary in the one case as in the other."

And, after citing and commenting upon the previous cases from Connecticut and Massachusetts, the court said: "In this case we hold as well upon general principles as upon the authority of the first two cases cited from 6 Wallace, that the tax for which the suit is brought is not a tax upon the capital stock or property of the company, but upon its corporate franchise, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States."

In *United States* v. *Perkins*, 163 U. S. 625, the question was whether personal property bequeathed by will to the United States was subject to an inheritance tax under the law of the State of New York.

The facts of the case were that one William W. Merriam, a resident of the State of New York, left a last will and testament, by which he devised and bequeathed all his estate, real and personal, to the United States. The surrogate assessed an

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inheritance tax of $3964.23 upon the personal property included in said bequest. Upon appeal to the general term of the Supreme Court the order of the Surrogate's Court was affirmed, and upon a further appeal to the Court of Appeals the judgment of the Supreme Court was affirmed, and the cause was brought to this court.

It was contended that, upon principle, property of the United States was not subject to state taxation; but it was held by this court, affirming the judgment of the courts below, that the tax was not open to the objection that it was an attempt to tax the property of the United States, since the tax was imposed upon the legacy before it reached the hands of the legatee; that the legacy became the property of the United States after it had suffered a diminution to the amount of the tax, and that it was only upon such a condition that the legislature assented to a bequest of it.

The reasoning of the court may be manifested by the following excerpts from the opinion delivered by Mr. Justice Brown:

"Though the general consent of the most enlightened nations has from the earliest historical period recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition, or imposing such conditions upon its exercise as it may deem conducive to public good. In this view the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee. This was the view taken of a similar

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tax by the Court of Appeals of Maryland in *State* v. *Dalrymple*, 70 Maryland, 294, in which the court observed:

"'Possessing, then, the plenary power indicated, it necessarily follows that the State in allowing property to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the legislature may deem expedient. These conditions, subject to the limitations named, are, consequently, wholly within the discretion of the general assembly. The act we are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our law should pay a certain premium for its enjoyment. In other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of two and a half per cent into the treasury of the State. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution.'

"That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held both in New York and in several other States, *Matter of the Estate of Swift*, 137 N. Y. 77, in which it is said that the 'effect of this special tax is to take from the property a portion, or percentage of it, for the use of the State, and I think it quite immaterial whether the tax can be precisely classified with a taxation of property or not. It is not a tax on persons.' *Matter of Hoffman*, 143 N. Y. 237; *Schoolfeld's Executor* v. *Lynchburg*, 78 Virginia, 366; *Strode* v. *Commonwealth*, 52 Penn. St. 181; *In re Cullum*, 145 N. Y. 593. In this last case, as well as in *Wallace* v. *Myers*, 38 Fed. Rep. 184, it was held that, although the property of the decedent included United States bonds, the tax might be assessed upon the basis of their value, because the tax was not imposed upon the bonds themselves, but upon the estate of the decedent, or the privilege of acquiring property by inheritance.

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Eyre v. *Jacob*, 14 Grattan, 422; Dos Passos on Inheritance Tax Law, chap. 2, and cases cited.

"Such a tax was also held by this court to be free from any constitutional objection in *Mager* v. *Grima*, 8 How. 490, Mr. Chief Justice Taney remarking that 'the law in question is nothing more than the exercise of the power which every State and sovereignty possesses, of regulating the manner and terms under which property, real and personal, within its dominion may be transferred by last will or testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. . . . If a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy.' To the same effect is *United States* v. *Fox*, 94 U. S. 315.

"We think it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

One of the propositions recognized in that case applicable to the present one is that a state tax that would be invalid if imposed directly on a legacy to the United States, may be valid if the amount of the tax is taken out of the legacy before it reaches the hands of the government—the theory of such a view apparently being that the property rights of the government do not attach until after the tax has been paid, or until the condition imposed by the tax law of the State has been complied with. Such is also the case in respect to the legacy to Ella Plummer Brown, as the statute in question distinctly makes it the duty of the executor to pay the amount of the tax before the legacy passes to the legatee.

In *New York* v. *Roberts*, 171 U. S. 658, an effort was made to have a tax imposed against corporations based upon "capital employed within the State" declared invalid, in that partic-

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ular case, because a portion of such capital consisted of imported goods in original packages; and this court said:

"Again it is said that, assuming that the importation of crude drugs and their sale in the original packages constituted a portion of the corporate business, no tax could be imposed by the State under the doctrine of *Brown* v. *Maryland*, 12 Wheat. 419. But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, the validity of the inheritance tax law of Illinois was assailed because of inequalities and discriminations so great as to amount to a deprivation of property and to a denial of the equal protection of the laws. The law in question had been upheld by the Supreme Court of the State in the case of *Kochersperger* v. *Drake*, 167 Illinois, 122, hereinbefore referred to.

This court held that the law was one within the competency of the legislature of the State to make, and that it did not conflict in anywise with the provisions of the Constitution of the United States. In the course of the discussion, Mr. Justice McKenna, who delivered the opinion of the court, said:

"The constitutionality of inheritance taxes has been declared and the principles upon which they are based explained in *United States* v. *Perkins*, 163 U. S. 325; *Strode* v. *Commonwealth*, 52 Penn. St. 181; *In re Merriam*, 141 N. Y. 479; *Minot* v. *Winthrop*, 162 Mass. 113; and in *Scholey* v. *Rew*, 23 Wall. 331.

"It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural

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right or privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

In closing our review of the Federal decisions the case of *Wallace* v. *Myers*, 38 Fed. Rep. 184, may be properly referred to, especially as it has been cited with approval by this court in *United States* v. *Perkins*, 163 U. S. 625, 629.

The question involved was the very one we are now considering, namely, the validity of the inheritance tax law of the State of New York when applied to a legacy consisting of United States bonds. In his opinion Circuit Judge Wallace reviewed many of the state and Federal decisions heretofore referred to, and reached the conclusion that the tax was to be regarded as imposed, not on the bonds, but upon the privilege of acquiring property by will or inheritance, and that where the property of the decedent included United States bonds, the tax may be assessed upon the basis of their value.

We think the conclusion, fairly to be drawn from the state and Federal cases, is, that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed.

Passing from the authorities, let us briefly consider some of the arguments advanced in the able and interesting brief filed in behalf of the plaintiff in error.

The propositions chiefly relied on are, first, that an inheritance tax, if assessed upon a legacy or interest composed of United States bonds, is within the very letter of the United States statute which declares that such bonds "shall be exempt from taxation in *any form* by or under state, municipal or local

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authority;" and, second, that the tax in question is unconstitutional, because impairing and burdening the borrowing power of the United States.

But if the first proposition is sound and decisive of the question in this case, then it must follow that the cases in which this court has held that, in assessing a tax upon corporate franchises, the amount of such a tax may be based upon the entire property or capital possessed by the corporation even when composed in whole or in part of United States bonds, must be overruled. Plainly in those cases, as in this, there was taxation *in a form*, and in them as in this the amount of the tax was reached by including in the assessment United States bonds.

So that we return to the authorities, by which it has been established that a tax upon a corporate franchise, or upon the privilege of taking under the statutes of wills and of descents, is a tax not upon United States bonds if they happen to compose a part of the capital of a corporation or a part of the property of a decedent, but upon rights and privileges created and regulated by the State.

The second proposition relied on, namely, that to permit taxation of the character we are considering would operate as a burden upon the borrowing power of the United States, cannot be so readily disposed of. Still, we think, some observations can be made which will show that the mischief, which it is claimed will follow if such statutes be sustained as valid, is by no means so great or important as supposed.

And here, again, it is obvious that to affirm the second proposition will require an overruling of our previous cases. For, on principle, if a tax on inheritances, composed in whole or in part of Federal securities, would, by deterring individuals from investing therein, and, by thus lessening the demand for such securities, be regarded as therefore unlawful, it must likewise follow that, for the same reasons, a tax upon corporate franchises measured by the value of the corporation's property, composed in whole or in part of United States bonds, would also be unlawful.

To escape from this conclusion, it is contended, in the argument of the plaintiff in error, that, conceding that such taxes

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may be valid as imposed on corporate franchises, and permitting our decisions in such cases to stand, yet that the case of the estates of decedents is different; that individual persons will be driven to consider, when making their investments, whether they can rely on their legatees or heirs receiving United States bonds unimpaired by state action in the form of taxation; and that if it should be held by this court that such taxation is lawful, capital would not be invested in United States bonds on terms as favorable as if we were to hold otherwise.

This is only to state the proposition over again. For, if it were our duty to hold that taxation of inheritances, in the cases where United States bonds pass, is unlawful because it might injuriously affect the demand for such securities, it would equally be our duty to condemn all state laws which would deter those who form corporations from investing any portion of the corporate property in United States bonds.

In fact, the mischief, if it exists at all and is not merely fanciful, might be supposed to be much greater in the case of state laws taxing franchises than the case of taxing the estates of decedents. So small now is the income derivable from Federal securities that few individuals, and those only of great wealth, can afford to invest in them; and the demand for them is mostly confined to banking associations and to large trading and manufacturing companies which invest their surplus in securities that can be readily and quickly converted into cash. Moreover, no inconsiderable portion of the United States loans is taken and held, as every one knows, in foreign countries, where doubtless it is subjected to municipal taxation.

While we cannot take judicial notice of the comparative portions of the government securities held by individuals, by corporations and by foreigners, we still may be permitted to perceive that the mischief to our national credit, so feelingly deplored in the briefs, caused by state taxation upon estates of decedents, would be inappreciable, and too remote and uncertain to justify us now in condemning the tax system of the State of New York.

It is further contended that there is a vital difference between the individual and the corporation; that the individual exists

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and carries on his operations under natural power and of common right, while the corporation is an artificial being, created by the State and dependent upon the State for the continuance of its existence, and subject to regulations and to the imposition of burdens upon it by the State, not at all applicable to natural persons.

Without undertaking to go beyond what has already been decided by this court in *Mager* v. *Grima*, 8 How. 490, in *Scholey* v. *Rew*, 23 Wall. 331, and in *United States* v. *Perkins*, 163 U. S. 625, and in the other cases heretofore cited, we may regard it as established that the relation of the individual citizen and resident to the State is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right, as legatee, devisee or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the State, and we are unable to perceive any sound distinction that can be drawn between the power of the State in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents. And, at all events, the mischief apprehended, of impairing the borrowing power of the government by state taxation, is the same whether that taxation be imposed upon corporate franchises or upon the privilege created and regulated by the statutes of inheritance.

Again, it is urged that the pecuniary amount of the state tax which is to be set aside is of no legal consequence; that any amount, however inconsiderable, is an interference with the constitutional rights of the United States, and must therefore be annulled by the judgment of this court. Of course, nobody would attempt to affirm that an unconstitutional tax could be sustained by claiming that, in a particular case, the tax was insignificant in amount.

But when the effort is made, as is the case here, to establish the unconstitutional character of a particular tax by claiming

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that its remote effect will be to impair the borrowing power of the government, courts in overturning statutes, long established and within the ordinary sphere of state legislation, ought to have something more substantial to act upon than mere conjecture. The injury ought to be obvious and appreciable. It may be opportune to mention that, even while we have been considering this case, the United States government has negotiated a public loan of large amount at a lower rate of interest than ever before known. From this it may be permissible to infer that the existence of legislation, whether state or Federal, including Federal securities as part of the mass of private property subject to inheritance taxes, has not practically injured or impaired the borrowing power of the government.

The contention of the plaintiff in error that taxation of the estates of decedents, in any form, and however slight, is invalid, if United States bonds are included in the appraisement, seems to be unreasonable. Suppose a decedent's estate consisted wholly of United States securities, could it reasonably be claimed that the charges and expenses of administration, imposed under the laws of the State, would not be payable out of the funds of the estate? If the estate were a small one, such expenses might require the application of all the Federal securities. If the estate were a large one, the expenses attendant upon administration would be proportionately large, to be raised out of the Federal securities. It is not sufficient to say that such expenses are in the nature of statutory debts, and that the question of the exemption of United States bonds cannot arise until after the debts of the estate shall have been paid. For, after all, what is an inheritance tax but a debt exacted by the State for protection afforded during the lifetime of the decedent? It is often impracticable to secure from living persons their fair share of contribution to maintain the administration of the State, and such laws seem intended to enable to secure payment from the estate of the citizen when his final account is settled with the State. Nor can it be readily supposed that such obligations can be evaded or defeated by the particular form in which the property of the decedent was invested.

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Statement of the Case.

Upon the whole, we think that the decision of the courts below was correct, and the judgment is therefore

Affirmed.

Mr. Justice White dissented.

Mr. Justice Peckham took no part in the decision.

MURDOCK v. WARD.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 458. Argued December 5, 6, 7, 1899. — Decided May 14, 1900.

Knowlton v. *Moore*, *ante*, 41, followed in this case as to the points there decided.

Plummer v. *Coler*, *ante*, 115, affirmed and followed in this case.

As the parties below proceeded upon a mutual mistake of law in construing and applying the statute the court thinks that the practical injustice that might result from an affirmance of the judgment may be avoided by reversing it at the cost of the plaintiff in error, and sending the cause back to the Circuit Court, with directions to proceed therein according to law.

In October, 1899, George T. Murdock, as executor of the last will and testament of Jane H. Sherman, brought an action in the Supreme Court of the State of New York, against John G. Ward, collector of internal revenue for the fourteenth district of the State of New York, wherein the plaintiff sought to recover the sum of $36,827.53, which the plaintiff alleged had been unlawfully exacted from him as executor of said estate.

On petition of the defendant, the cause was removed into the Circuit Court of the United States for the Southern District of New York.

The complaint contained the following allegations:

"I. Jane H. Sherman, late of the village of Port Henry, in the county of Essex and State of New York, died on about the 30th day of September, 1898, leaving certain property, and also leaving a last will and testament, in and by which said will this

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plaintiff, George T. Murdock, was appointed to be, and by due order of the surrogate of the county of Essex, in the State of New York, to whom jurisdiction in that behalf pertained, he has become, and is, the sole executor of the said last will and testament of said Jane H. Sherman.

"II. The plaintiff further alleges and states that the said Jane H. Sherman, deceased, upon her death left a very considerable amount of personal property, amounting to upwards of one million of dollars.

"III. That the defendant, John G. Ward, at all the times mentioned in this complaint, was and he is collector of internal revenue for the fourteenth district of the State of New York, having his office and official place of residence at the city of Albany, in the State of New York.

"IV. That said John G. Ward, assuming to act as such collector, and assuming and pretending to act under and by virtue of the laws of the United States, which he assumed conferred authority upon him therefor, and particularly under and in pursuance of the provisions of an act of the Congress of the United States, commonly known as the 'war revenue law' of June 13, 1898, and being an act to provide ways and means to meet war expenditures, and for other purposes, passed by the Congress of the United States, and becoming a law on the 13th day of June, 1898, did, on or about the fourth day of April, 1899, by force and duress, exact, demand and collect from this plaintiff and from the estate represented by him as such executor the sum of thirty-six thousand eight hundred and twenty-seven dollars and fifty-three cents, ($36,827.53,) and upon the claim and under the pretext that the same was a lawful assessment as an internal revenue tax upon the estate of said deceased and against this plaintiff, as executor of said deceased, on account of the legacies or distributive shares arising from personal property, being in charge or trust of this plaintiff, as such executor as aforesaid, the properties assumed to be assessed for such tax being properties passing from the said Jane H. Sherman.

"V. That on or about the 8th day of April, 1899, this plaintiff, under protest, and protesting that he was not nor was the estate represented by him liable to pay said tax, involuntarily

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and under duress, because of the illegal demand made upon him by said defendant, did pay to the said defendant as such collector, as aforesaid, the said sum of $36,827.53.

"VI. That thereafter, believing the imposition of said tax and its collection to be unlawful, this plaintiff did appeal to the Commissioner of Internal Revenue and to the Treasury Department of the United States of America from the action and decision of said defendant in holding this plaintiff to be liable for the payment of said tax and in collecting the said tax in manner aforesaid, and did state and represent to said Commissioner that the collection of said tax was unlawful, and that the amount thereof should be refunded for the following reasons:

"'First. The imposition of said tax was unconstitutional, unlawful and void.

"'Second. The imposition and collection of said tax deprived this deponent of his property and the estate represented by him of its property without due process of law.

"'Third. That the law imposing said tax is not uniform, and does not afford equal protection of the laws to persons throughout the United States.

"'Fourth. That the law imposing said tax denied and does deny to persons throughout the United States and within its jurisdiction the equal protection of the laws.

"'Fifth. That the law under which said tax was imposed denies to this deponent the equal protection of the laws.

"'Sixth. The tax so imposed is a direct tax, and is void because not apportioned among the States in proportion to their population and in accordance with the provisions of the Constitution of the United States.

"'Seventh. If said tax is an impost, excise or duty, the law imposing the same is unconstitutional and void, because the tax levied is not uniform throughout the United States, as required by the Constitution of the United States; and

"'Eighth. It is not within the province of the constitutional powers of the United States to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the State of New York.'

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"And this plaintiff did, in and by such appeal, claim that he was entitled to have the sum of money so paid and the amount thereof refunded, and he did then and there ask and demand the return of the same moneys to him, and did appeal from the act of said defendant, as such collector, in imposing said tax and exacting from plaintiff payment of the amount thereof.

"VII. On the 21st day of October, 1899, the said Commissioner of Internal Revenue and the Treasury Department of the United States, represented by the said Commissioner of Internal Revenue, did disallow the appeal of this plaintiff in the behalf above stated, and did reject the claim of the plaintiff to have refunded the amount of the tax paid as aforesaid.

"VII. A very large proportion and at least one third of the personal estate upon account of which said tax was exacted from and paid by this plaintiff consisted in the bonds and interest-bearing evidences of debt issued by the government of the United States, and which by contract between the United States and the holders thereof were and are not subject or liable to assessment or taxation, nor was or is this plaintiff subject or liable to assessment or taxation by means of his ownership or holding, as executor, as aforesaid, or otherwise of such bonds and certificates of indebtedness.

"IX. This plaintiff claims and charges that by reason of the premises the amount of said tax has been unlawfully exacted from him as executor of said estate; that each and every of the grounds stated by him in the above-mentioned appeal to the said Commissioner of Internal Revenue states and represents a true and lawful reason why the imposition of said tax is unlawful and why the said tax should be refunded.

"Wherefore this plaintiff demands judgment against the said defendant for the sum of thirty-six thousand eight hundred and twenty-seven dollars and fifty-three cents, ($36,827.53,) with interest from the 8th day of April, 1899, with the costs of this action."

The defendant, appearing by Henry L. Burnett, United States attorney for the Southern District of New York, demurred to the complaint upon the ground that the complaint did not state facts to constitute a cause of action.

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On November 14, 1899, after hearing, the Circuit Court sustained the demurrer and ordered the complaint to be dismissed with costs to the defendant. Thereupon a writ of error was allowed to the judgment and the cause was brought to this court.

Mr. John G. Carlisle and *Mr. Charles E. Patterson* for plaintiffs in error. *Mr. Alpheus T. Bulkeley* was on Mr. Patterson's brief.

Mr. Solicitor General for defendant in error.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

That the tax imposed under the provisions of the revenue act of June 13, 1898, is a direct tax, and, therefore, void because not apportioned among the States in proportion to their population; that if not a direct tax, but an impost, excise or duty, it is void, because the tax levied is not uniform throughout the United States; and that it is not within the province of the constitutional power of the United States to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the State of New York, are contentions of the plaintiff in error which have been determined against him in the case of *Knowlton and Buffum, Executors*, v. *Moore, Collector*, *ante*, 41, just decided by this court. The opinion in that case so fully discusses the arguments urged in support of those propositions that their further consideration is unnecessary.

The remaining question is that presented by the following assignment of error:

"The court erred in refusing to find that, in so far as the estate of the deceased consisted of the government bonds of the United States mentioned in said complaint, the Congress had no right or authority to impose or assess any tax upon the same, and in refusing to find that the plaintiff in error was entitled to recover back from the defendant in error in this action the amount of the tax mentioned in his complaint, and which was assessed against the plaintiff in error because of his ownership as executor, as aforesaid, of such bonds of the government of the United States."

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The only allegation in the complaint respecting bonds of the United States is contained in the eighth paragraph, which is as follows:

"A very large proportion and at least one third of the personal estate upon account of which said tax was exacted from and paid by this plaintiff consisted in the bonds and interest-bearing evidences of debt issued by the government of the United States, and which by contract between the United States and the holders thereof were and are not subject or liable to assessment or taxation, nor was or is this plaintiff subject or liable to assessment or taxation by means of his ownership or holding as executor, as aforesaid, or otherwise, of such bonds and certificates of indebtedness."

The complaint does not set forth the terms of the will, nor attach a copy of it as an exhibit. And it is suggested in the brief of the Solicitor General, filed on behalf of the United States, that, as presented by the record, this is not a case where United States bonds have passed from the testatrix to legatees, but where a personal estate of a certain value in money has passed to the executor to be charged against him as money, to be distributed among the beneficiaries under the will; and that, therefore, for aught that appears, the executor may have sold every bond and distributed the proceeds in money; and that, even if legatees, entitled to certain sums of money, shall have accepted United States bonds in lieu of money, they would take the bonds, not under the will, but as purchasers.

However, the complaint does allege that the money which is sought to be recovered was assessed against the plaintiff as executor of the deceased "on account of legacies or distributive shares arising from personal property being in his charge or trust, as such executor as aforesaid, the properties assumed to be assessed for such tax being properties passing from the said Jane H. Sherman," and were paid by him under duress. Such allegations, taken in connection with that contained in the eighth paragraph, above quoted, to the effect that, of the property taxed, at least one third part consisted of United States bonds, makes it to sufficiently appear that United States bonds, in the hands of the plaintiff as executor or trustee under a will, were

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included as a portion of the estate passing to the executor, and were assessed and taxed as such portion. It may also be observed that it is the executor or trustee who has in charge the legacies or distributive shares arising from personal property, passing after the passage of the act, from any person possessed of such property, who is the person taxed in respect to such property. Accordingly, we think there is room in this record for the contention of the plaintiff in error that, as matter of fact, bonds of the United States formed a portion of the property actually assessed; and that, consequently, the court is called upon to determine whether it was obligatory on the executor of Jane H. Sherman to include in his statement to the collector bonds of the United States in his possession and charge as such executor, and whether it was the right and duty of the collector to demand and receive from the executor a sum of money measured by the value of the property in his hands, although composed in part of United States bonds.

Putting aside, as already disposed of in the case of *Knowlton* v. *Moore*, the claims that inheritance and legacy taxes imposed by the United States in the act of June 13, 1898, are invalid because, as direct taxes, not apportioned, or, as duties, for want of uniformity, or because the taxing power of the United States does not reach such property transmissible under the laws of the States, it is conceded, as we understand the argument of the plaintiff in error, that United States bonds would be properly included in estimating the amount of an inheritance or legacy tax, were it not for the clauses contained in the United States statutes exempting such bonds from state and Federal taxation. On the other hand, it is not denied by the counsel for the government that it was the intention of those clauses to exempt the bonds and interest thereon from any Federal tax, direct or indirect. What is denied is that there was any intention on the part of Congress, by the clauses mentioned, to exempt the portion of an estate invested in United States bonds from either a state or Federal inheritance tax.

It is claimed by the plaintiff in error, and conceded by the government, that the exemption clause was incorporated into the bonds and became a subsisting contract between the gov-

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ernment and the bondholders. It is further contended on the one side and conceded on the other, that this contract extends to the *assigns* of the holders. But a legal issue is joined when it is affirmed by the plaintiff in error and denied by the government, that *assigns* must be interpreted to include those whose title is derived under the inheritance and legacy laws of the States.

It has just been decided by this court, in the case of *Plummer, Executor*, v. *Coler*, *ante*, 115, where the question involved was the validity of the inheritance tax law of the State of New York when applied to a legacy consisting of United States bonds containing a clause of exemption from state and Federal taxation, that the conclusion fairly to be drawn from the state and Federal cases is that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed.

It may be said that in that case we were dealing with the sovereign power of a State to tax property within her own limits; but still the contention had to be met that Federal bonds were not within the taxing power of the State, not only because they were declared to be exempt from state taxation in any form, but because they were means devised by the government to raise money, and that such a purpose might be defeated if the States were permitted to tax the bonds in the hands of their holders. The conclusion, however, was reached, following state and Federal cases cited, that the inheritance or legacy tax law of the State of New York did not expressly, or by necessary implication, propose to tax Federal securities; that the tax was not imposed on the property passing under the state laws, but on the right of transfer by will or under the intestate law of the State; that whatever the form of the property, the right to succeed to it is created by law, and if it consists of United States bonds, the transferee derives his right to take them, as

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he does his right to take any other property of the decedent, under the laws of the State, and the State by its statutes makes the right subject to the burden imposed.

A similar distinction has been recognized by several of the state courts, which have held that while a tax imposed on United States bonds by a state statute would be invalid because beyond the reach of the state's power to tax, yet that a tax upon the franchises or capital stock of a state corporation, measured by the value of its entire property, would be valid, even if the property was composed in whole or in part of Federal securities, because the tax can be regarded as imposed, not on specific property, but on the rights and privileges bestowed by the State. *Commonwealth* v. *Provident Institution*, 12 Allen, 312; *Commonwealth* v. *Hamilton Manuf'g Company*, 12 Allen, 298; *Coite* v. *Society for Savings*, 32 Conn. 173.

The judgments in those cases, holding that state taxes may be lawfully imposed, the amount of which may be determined by the aggregate amount of the property or capital stock of banking or manufacturing companies, even if such property or capital stock includes United States bonds issued under a statute declaring them exempt from taxation under state authority, were affirmed by this court. *Society for Savings* v. *Coite*, 6 Wall. 594; *Insurance Co.* v. *Massachusetts*, 6 Wall. 611; *Hamilton Manufacturing Co.* v. *Massachusetts*, 6 Wall. 632.

Without repeating the discussion in the opinion in *Plummer, Ex'tr*, v. *Coler*, and following the conclusion there reached, we are unable to distinguish that case from the present one.

If a state inheritance law can validly impose a tax measured by the amount or value of the legacy, even if that amount includes United States bonds, the reasoning that justifies such a conclusion must, when applied to the case of a Federal inheritance law taxing the very same legacy, bring us to the same conclusion. We must, therefore, hold that if, as held in *Knowlton* v. *Moore*, the tax imposed under the act of June 13, 1898, is not invalid as a direct, unapportioned tax, nor for want of uniformity, nor as an infringement upon the laws of the states regulating wills and descents, then the tax upon legacies or be-

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quests, descendible under and regulated by state laws, is valid, even if such legacies incidentally are composed of Federal bonds.

It cannot be denied that the government of the United States has, and has heretofore exercised, the power to tax its own bonds. By the act of July 1, 1862, 12 Stat. 474, there was imposed a tax upon the interest on United States bonds at one half the rate of the tax imposed upon the income of other property; and by the acts of June 30, 1864, 13 Stat. 281 and 479, the discrimination in favor of the holders of United States bonds was abandoned, and the interest on them was taxed at the like rates as other income.

The argument in this case turns, at last, upon the proposition that, by the exempting clauses in the statutes and on the face of the bonds, the United States entered into a contract with those who should buy and hold the bonds that neither principal nor interest should be taxed.

Whether the United States, in the exercise of the power of taxation, can be estopped by a contract that such power shall not be exercised, we need not consider, because the contract in this case does not, as we view it, mean that a State may not, or the United States may not, tax inheritances and legacies, regardless of the character of the property of which they are composed. That some of the holders of United States bonds may have paid franchise taxes to the States, and others may have paid state or Federal inheritance and legacy taxes, has nothing to do with the contract between the United States and the bondholders. The United States will have complied with their contract when they pay to the original holders of their bonds, or to their assigns, the interest, when due, in full, and the principal, when due, in full.

These views demand an affirmance of the judgment of the Circuit Court sustaining the defendant's demurrer to the complaint.

We observe that it appears in the schedule of legacies prepared by the executor in this case, on a form apparently furnished by the collector of internal revenue, that several of the legacies under Mrs. Sherman's will were for sums under ten thousand dollars, and which were, therefore, under the construc-

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tion put by this court on the statute in *Knowlton* v. *Moore*, not taxable. It also appears that the theory on which the taxes were computed in respect to legacies over ten thousand dollars was by measuring the tax by the amount of the entire estate, instead of by the amount of each legacy. This method of construing and applying the statute we have held, in *Knowlton* v. *Moore*, to be erroneous. Therefore, the executor, representing the respective legatees, is entitled to recover back the amount of taxes paid on legacies under ten thousand dollars, and likewise such excess of taxes as was paid by reason of the erroneous interpretation of the statute.

We here meet the formal difficulty that neither the complaint in the Circuit Court nor the assignments in error in this court apparently questioned the correctness of the construction put upon the statute by the collector. The questions raised and considered only involved the validity of the act, and not its construction if valid.

As, however, the parties proceeded on a mutual mistake of law, we think the practical injustice that might result from an affirmance of the judgment may be avoided by reversing the judgment at the cost of the plaintiff in error, and sending the cause back to the Circuit Court with directions to proceed therein according to law.

And accordingly it so ordered.

Mr. Justice White dissented in respect to the taxability of the bonds.

Mr. Justice Peckham took no part in the decision of the case.

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SHERMAN *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

No. 459. Argued December 5, 6, 7, 1899. — Decided May 14, 1900.

Knowlton v. *Moore*, *ante*, 41, and *Murdock* v. *Ward*, *ante*, 139, followed.

In the Circuit Court of the United States for the Northern District of New York, on November 20, 1899, George D. Sherman filed a complaint against the United States seeking to recover from said defendant the sum of $8969.02, which he claimed had been unjustly exacted by John G. Ward, collector of internal revenue for the fourteenth district of New York, from George T. Murdock, executor of the last will of Mrs. Jane H. Sherman, the mother of complainant, as a duty or tax imposed by virtue of the provision of the act of June 13, 1898; that said sum of $8969.02 was deducted by the said executor from the income due and payable under the provisions of said will to the complainant; that the income, of which the complainant was entitled to receive an annual portion during his life, was composed in part of United States bonds, which the complainant avers to be, by virtue of the acts of Congress under which they were issued, non-taxable and non-assessable for the purposes of taxation.

The complaint further alleged, among other things, that the tax so imposed was void because a direct tax, not apportioned among the States in proportion to their population; that if said tax was not direct, but an impost, excise or duty, the same was void, because not uniform throughout the United States; and that it is not within the constitutional power of Congress to levy a tax upon a right of inheritance or disposition by will provided for by the laws of the State of New York, or to require the payment of a larger or different amount of tax from or imposed upon a legacy or a legatee, because of the greater wealth of the donor of such legacy, than is required when the legacy is a gift of a testator of smaller means.

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The United States, appearing by Charles H. Brown, United States Attorney for the Northern District of New York, demurred to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action. On hearing the Circuit Court sustained the demurrer, and ordered that the complaint be dismissed. A writ of error was allowed to this judgment, and the cause was brought to this court.

Mr. John G. Carlisle and *Mr. Charles E. Patterson* for plaintiffs in error.

Mr. Solicitor General for defendant in error.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

In so far as the contentions urged in this action are based on the allegation that the tax imposed on the legacies left in the will of Mrs. Jane H. Sherman is void because it is an unapportioned, direct tax, or, if not a direct tax but a duty or excise, the same is void because not uniform throughout the United States, or void because it is not competent to levy an inheritance or legacy tax upon property passing to legatees under the laws of the State of New York, they have been disposed of adversely to the plaintiff, in the case of *Knowlton, Executor*, v. *Moore, Collector*, *ante*, 41, recently decided by this court.

So, too, the proposition that bonds of the United States and the income therefrom are not lawfully taxable under an inheritance tax law of the United States, because exempted by contract from such tax, has just been decided not to be well founded, in the case of *Murdock* v. *John G. Ward*, *ante*, 139.

The allegation in the complaint that "it is not within the constitutional power of Congress to require the payment of a larger or different amount of tax from or imposed upon a legacy or a legatee because of the greater wealth of the donor of such legacy than is required when the legacy is the gift of a testator of smaller means," need not be considered, because this court has held, in the case of *Knowlton, Executor*, v. *Moore*, that, upon a proper construction of the act of June 13, 1898, the

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amount of the inheritance or legacy tax levied thereunder is measured by the amount of the legacy or distributive share passing under the laws of the State, and not by the amount of the estate of the testator or of the deceased owner.

As, however, it appears in this record that the taxes actually levied and paid on the legacies left by the will of Mrs. Sherman were computed upon the mistaken assumption that the amount of the estate of the testatrix was the measure of the tax, and not the amount of the respective legacies, the complainant is entitled to be repaid the excess thus imposed upon his legacy. As we have reversed the judgment in the case of *Murdock, as Executor of Mrs. Sherman*, v. *The Collector*, and have remanded that case to the Circuit Court of the Southern District of New York, in order that the erroneous computation may be corrected, and as thus what is coming to the plaintiff in error, upon such correction being made, will be recovered by Murdock as executor and trustee under the will of Mrs. Sherman, and thereby and in that case the plaintiff in error will be indemnified, he needs no further proceeding in his suit in the Circuit Court for the Northern District of New York. Lest, however, the judgment dismissing his complaint may embarrass his right to claim indemnity from the executor, we shall reverse this judgment, and it is so ordered.

Reversed.

Mr. Justice White dissented in respect to the taxability of the bonds.

Mr. Justice Peckham took no part in the decision of the case.

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CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* HOWARD.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 247. Argued April 17, 18, 1900. — Decided May 21, 1900.

The wife of the defendant in error, while travelling from Louisville to Washington on a through ticket, in a car of the plaintiff in error, and on a train conducted by his agents, was run off the track and down a bank in consequence of the weakness of a wheel which might have been known, and suffered a serious and lasting injury, for which an action was brought to recover compensation. The defence set up that at the time the accident happened the train was managed by a Connecticut company to whom the road had been leased. *Held*, that that fact would not bar a recovery; that if notwithstanding the execution of the lease the plaintiff in error, through its agents and servants, managed and conducted and controlled the train to which the accident happened, it would be responsible for that accident.

THE railroad company seeks by this writ of error to reverse a judgment obtained against it at a trial term of the Supreme Court of the District of Columbia in favor of defendants in error, which judgment has been affirmed by the Court of Appeals of the District.

The defendants in error are husband and wife, and the action was brought by them to recover damages alleged to have been sustained by the wife because the car in which she was riding ran off the track while forming part of a train in transit from Louisville, Kentucky, to the city of Washington, D. C. The accident occurred during the night of November 16, 1886, at a place called Soldier, in the State of Kentucky, and about 60 miles west of the east line of the State, and while the train was running on the rails of the Elizabethtown, Lexington and Big Sandy Railroad Company, which was a Kentucky corporation.

The amended declaration of the plaintiffs below alleged that the train on which the wife was a passenger was operated and conducted by the agents of the plaintiff in error, and that the plaintiff in error was managing and operating a line of railway

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between the cities of Louisville, in the State of Kentucky, and Washington city, in the District of Columbia, and upon said line of railway it was a common carrier of passengers for hire; that on the 18th of November, 1886, the plaintiff, Laura P. Howard, purchased from the agents of the defendant, at the city of Louisville, a ticket entitling her to a passage upon the railway from the city of Louisville to the city of Washington, and the defendant, it was alleged, thereupon became bound to safely carry and transport her from the city of Louisville to the city of Washington, but the defendant did not carry or transport her safely, and that near the town of Soldier, in the State of Kentucky, by the unskillfulness, carelessness and wrongful neglect and mismanagement of defendants' agents in charge of said train, the sleeping car in which she was riding left the track, and went down an embankment and was demolished, and she was badly wounded and injured, and that by reason of these injuries she suffered great pain, and has been rendered permanently unable to do any business.

The defendant took issue upon these allegations, and the case went to trial. It has been twice tried, and upon the first trial, when all the evidence was in, the court directed a verdict for the defendant on the ground that no liability on its part had been shown for the accident in question. Upon appeal to the Court of Appeals of the District that court reversed the judgment, 11 App. D. C. 300, and granted a new trial. A retrial was had, and the jury found a verdict in favor of the plaintiff, upon which judgment was entered, and on appeal it has been affirmed by the Court of Appeals. 14 App. D. C. 262.

Mr. Leigh Robinson for plaintiff in error.

Mr. R. Ross Perry for defendants in error. *Mr. James Francis Smith* and *Mr. R. Ross Perry, Jr.*, were with him on the brief.

Mr. Justice Peckham, after stating the above facts, delivered the opinion of the court.

The injuries sustained by Mrs. Howard, as shown by the evi-

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dence, are very serious, and undoubtedly permanent. The accident happened at night, the car in which she was sleeping left the rail and went over an embankment about thirty feet high, and was broken to pieces. She was released from the car and taken to a cottage by the wayside, and subsequently was given a berth in a sleeping car and brought to Washington.

On the trial she was sworn as a witness, and testified that the disease was evidently progressing, because she could not sit up as long; that she could not walk any distance; could not ride in the street cars without great suffering; that she suffered in various ways a great deal, in her head and in her spine, and was never free from pain. The suffering in her head was at the base of the brain, and if she wanted to see anything back of her she had to turn her entire body; she could not turn her head either way. She said she had been under the doctor's care most of the time during the past eleven years up to the time of the trial.

Dr. Chrystie, a specialist in spinal diseases, testified on the trial that Mrs. Howard placed herself under his treatment early in 1887, and had been under his treatment ever since. He said that she was suffering from an incurable spinal affection, which was progressive, occasioning great suffering and almost total disability. The witness had contrived and made for her an apparatus grasping the hip and extending up to the shoulders and giving support in front, which steadies the back as a broken bone would be steadied, and this gives her partial relief, but the disease is located so low down, so much superincumbence of weight above, that it does not give her complete relief. The apparatus is made of steel, and the doctor said should be worn constantly, and she should sleep in it at night. It is necessary for her to wear it every hour for comfort, as well as for the protection of her backbone. The disease is progressing slowly, and, if it had not been for this spinal assistance, he thought she would have had complete paralysis.

At the time of the accident she was a clerk in the Agricultural Department at Washington, but since that time has been compelled to give up her position, and has been unable to do any work.

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The probable cause of the accident, as shown by the evidence given by the plaintiffs, was an imperfect flange on one of the wheels of the sleeping car in which Mrs. Howard was riding. It did not appear that a careful inspection could not have discovered the defect. There was evidence also given as to the train being driven at a reckless rate of speed at the time. We think there was sufficient evidence of negligence to carry the case to the jury.

The most important question, that of the liability of the defendant company for the consequences of an accident on the road of another company, arises upon the evidence now to be considered.

In order to sustain their claim the plaintiffs gave evidence showing the following facts: The Elizabethtown, Lexington and Big Sandy Railroad Company, hereinafter called the Kentucky company, was incorporated by an act of the legislature of Kentucky, approved January 29, 1869, for the purpose of building a railroad from Elizabethtown to a point on the Big Sandy River at or within 20 miles of its mouth, all within the State of Kentucky. By a subsequent act the company was authorized to sell the railroad or lease the same whenever it might be to the interest of the company to do so. The Big Sandy River is the boundary line between the States of West Virginia and Kentucky.

At this time the Chesapeake and Ohio Railway Company, the plaintiff in error, (hereinafter called the Virginia company,) or its predecessor, had been incorporated by an act of the legislature of Virginia, and was operating its railroad from Phœbus, a station about a mile east of Fortress Monroe, in Virginia, to Huntington, in the State of West Virginia, and about eight miles east of the Big Sandy River.

In 1877 the legislature of West Virginia passed an act providing for a terminus for the Chesapeake and Ohio Railway on that river, and for the building of a bridge over it so as to connect with the road of the Kentucky corporation. That corporation had not then built its road east of Mount Sterling, a place some distance west of the river, and on November 12, 1879, the Virginia and Kentucky corporations entered into an

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agreement, by which the Kentucky corporation was to complete its railroad from Mount Sterling east to the river, and thereby form a connection with the road of the Virginia company, and in consideration thereof the latter company was to complete its road from the station at Huntington to and across the river, and allow the Kentucky corporation the free and undisputed use of its railroad from the westerly bank, and across the river to the depot of the Virginia corporation in the city of Huntington, for the term of five years from the date of the completion of the road as stated.

Pursuant to the agreement this extension from Huntington west to the river was completed early in 1882, and at that time the Kentucky corporation had also completed its road from Mount Sterling east to the river, and had also a running arrangement over the Louisville and Nashville Railroad into the city of Louisville.

During these times Mr. C. P. Huntington was very largely interested and was the controlling spirit in a number of railroads situated both east and west of the Mississippi. He had built many new lines and extended many old ones, and had a plan for bringing into practically one management a line of railroad extending from the Atlantic to the Pacific. He was also desirous of organizing into one line his lines east of the Mississippi River, consisting of the Virginia company, the Kentucky company and the Chesapeake and Ohio and Southwestern Railroad Company.

After the completion of the road of the Virginia company from Huntington to the west side of the river and its connection with the Kentucky corporation at that point, an arrangement was made between the two corporations by which they were operated substantially as a continuous system. They were operated together by one general manager, under verbal directions from Mr. Huntington, who was president of the Virginia company, and owned a controlling amount of the stock of the Kentucky company. Under that arrangement the Virginia company "operated and maintained the line of railroad for and on account of the Elizabethtown, Lexington and Big Sandy Railroad Company, mostly west of the Big Sandy River,

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to Lexington, and included in that also the eight miles of track between the west bank of the river and Huntington. They operated it for and on account of the Elizabethtown, Lexington and Big Sandy Railroad Company, keeping an account on the books of the Chesapeake and Ohio Railway Company of all receipts of every character between Lexington and Huntington, including also the Louisville connection." This was in the early part of 1882. The arrangement continued, as testified to by one of the witnesses, who was an officer of the defendant, until the organization of the Newport News and Mississippi Valley Railroad Company, (hereinafter spoken of,) after which it is said that its officers operated the properties under the leases hereinafter mentioned. (This statement appears to be merely the conclusion of the witness from the other facts in the case.) The duration of the contract or arrangement under which the Virginia and Kentucky roads were operated as a continuous system was to be five years from the date of the completion of the road, which was in the early part of 1882, and that would have made the arrangement continue until 1887, a period subsequent to the happening of the accident. The witness supposed that the organization of the Newport News and Mississippi Valley Railroad Company terminated the contract by force of the lease above referred to. He stated that it was terminated in the same manner in which it was made, by the direction of Mr. Huntington; that Mr. Huntington directed Mr. Smith, the general manager, to operate the properties in accordance with the leases after they had been made. Mr. Huntington desired to extend, complete and bring his different railroads under one management, that of himself.

For the purpose of being able the more easily to accomplish this object, Mr. Huntington procured from the legislature of the State of Connecticut an act, approved March 27, 1884, incorporating the Southern Pacific Railroad Company, which was therein authorized and empowered to contract for and acquire, by purchase or otherwise, and buy, hold, own, lease, etc., railroads, railroad bridges, engines, cars, rolling stock and other railway equipment, etc., in any state or territory; "Provided, however, that said corporation shall not have power to

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make joint stock with, lease, hold, own or operate any railroad within the State of Connecticut."

On March 19, 1885, the legislature of Connecticut changed the name of the Southern Pacific Company to that of the Newport News and Mississippi Valley Company, with all the powers and privileges and subject to all the liabilities existing under the former name.

On January 29, 1886, the Kentucky corporation and the Newport News and Mississippi Valley Company, (the Connecticut corporation,) entered into an agreement of lease, by which the Kentucky corporation leased its road to the Connecticut corporation for 250 years from the first day of February, 1886, at a rental of $5000 per annum, and on June 15, 1886, the Virginia corporation and the Connecticut corporation also entered into an agreement, by which the railroad of the former was leased to the latter corporation from July 1, 1886, for 250 years, at a yearly rental of $5000.

As Mrs. Howard's injuries were sustained in November, 1886, on the railroad in Kentucky which had been leased to the Connecticut corporation the January previous, the plaintiff in error herein makes the claim that it is not liable for the results of that accident, because it did not occur on its road nor on the road of any company for the negligent acts of whose agents it was responsible.

Assuming that the Kentucky railroad had been leased to the Connecticut corporation, and that the latter was, at the time the accident occurred, actually engaged in the management of the former, and that the train to which the accident happened was conducted and managed by the agents of the Connecticut company, it might then be assumed that this plaintiff in error could not be held responsible for the result of such accident; but the simple fact that at the time when it occurred the lease spoken of was in existence would not conclusively bar a recovery in this case. If, notwithstanding the execution of the lease, the plaintiff in error in fact, through its agents and servants, managed and conducted and controlled the train to which the accident happened, it would be responsible for that accident, notwithstanding the existence of the lease. The evidence was

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sufficient to show that prior to the execution of the lease the Kentucky corporation was controlled and managed by the plaintiff in error, and it was so controlled and managed by the direction of Mr. Huntington, the president of plaintiff in error. It is claimed that this arrangement was wholly illegal, as beyond the powers of the Virginia corporation. But if, while the Kentucky corporation was managed under such agreement, an accident had occurred by reason of the negligence of the agents and servants of the Virginia company, it would have been liable for the damages arising therefrom, notwithstanding the agreement or arrangement under which such control was maintained was illegal. If the agents and servants of a corporation commit a wrong in the course of their employment and while in the performance of an agreement of the corporation which is *ultra vires*, the company is liable for the wrong thus committed, notwithstanding the illegality of the agreement. *National Bank* v. *Graham*, 100 U. S. 699, 702; *Salt Lake City* v. *Hollister*, 118 id. 256, 260; *Bissell* v. *Railroad Company*, 22 N. Y. 258; *Buffett* v. *Railroad Company*, 40 id. 168; *Nims* v. *Mount Hermon Boys' School*, 160 Mass. 177; *Railroad Company* v. *Haring*, 47 N. J. L. 137.

We are, therefore, brought to a consideration of the evidence in the record, tending to show that this train was a train of the plaintiff in error, controlled and managed by its agents and servants, for whose negligence it is liable.

The circumstances attending and leading up to the arrangement made between the Virginia and Kentucky companies in 1882, by which arrangement the former took upon itself the management of the Kentucky company, have been set forth somewhat in detail in order that such facts might be viewed in connection with the evidence as to the leases and the manner in which the affairs of the roads were thereafter conducted, so that the whole case could be examined to determine whether it was proper to submit to the jury the main question of fact: Who had the management and control of the train to which the accident happened?

Evidence was given that many years prior to the execution of the lease above referred to the Virginia company had estab-

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lished offices and an agency in the city of Washington for the purpose of obtaining business for that company and its connections, and it had entered into some kind of running arrangements with the Virginia Midland Railway Company, whose road extended from the city of Washington through the city of Charlottesville, in the State of Virginia, a station on the line of the Chesapeake and Ohio Company. After the arrangement between the Virginia and Kentucky companies above mentioned, if not before, the Virginia company sold tickets at Washington through to Louisville, and *vice versa*, and advertised the route in various newspapers throughout the country, especially in Washington and Louisville, in which the route was designated as the Chesapeake and Ohio Railroad, or Route, and it also advertised that it ran through or "solid" trains over this route. Such advertisements were continued after the execution of the lease up to and after the happening of this accident. There is room in the evidence for the inference, which a jury might draw, that the Chesapeake and Ohio Company, by these various facts, and by such advertisements, and by the tickets which it sold, held itself out to the public as a carrier of passengers between the two cities. There was no substantial change in the character either of the advertisements or of the tickets after the execution of the leases.

If the Virginia company did in fact thus hold itself out as a carrier of passengers between the two cities without change of cars and by a solid train, the inference that such train was its own, and that the servants in charge thereof were its servants, might be based upon that fact together with the other evidence in the case, and such inference would be for the jury.

For the sole purpose of organization, and the more readily to enable Mr. Huntington to work out his scheme for one continuous line from the Atlantic to the Pacific, he procured the acts of the Connecticut legislature incorporating the Newport News and Mississippi Valley Railroad Company. The capital stock of the corporation was fixed at a million dollars, divided into shares of one hundred dollars each, and the act provided that whenever five hundred thousand dollars should be subscribed and ten per centum of the subscription paid in cash, the stockholders

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might organize the corporation, which might then proceed to do the business authorized by the act. An affidavit of the secretary of the company attached to the copy of the articles of association, filed in the office of the secretary of State of West Virginia, showed the acceptance of this charter by the vote of a majority of the corporation and the subscription of five hundred thousand dollars to the capital stock on May 10, 1884, and the payment in cash of ten per centum at the time of such subscriptions. There was no proof of a dollar's worth of the capital stock ever having been issued, although officers of the company seem to have been elected. Mr. Huntington was the president of the corporation, and the officers of the Virginia corporation appear to have been also elected or to have acted as officers of the Connecticut corporation. After the execution of the leases already mentioned there seems to have been no actual change in the *personnel* of the officers of the leased road, nor in the actual management or control thereof. The same hands continued apparently in the same employment. There is no proof of the payment of a single dollar on account of these leases, but nevertheless a formal transfer was alleged to have been made to the lessee of the rolling stock and equipment of the Virginia and Kentucky corporations. The evidence is sufficient to admit the inference that it was a merely formal although possibly valid lease for the purpose of organization, which would render it easier to accomplish the formation of a continuous line, which Mr. Huntington had at heart. The same offices in the city of Washington were retained after the lease as before. The same individuals remained in the same relative positions therein, and substantially the same advertisements and the same kind of tickets were inserted in the newspapers and sold at the offices after as before the execution of the leases. The sign at the Washington office was "Chesapeake & Ohio Railway Ticket Office," at the windows where the tickets were sold and over the doors, and no change was made after the execution of the leases, and after that time, as well as prior thereto, they continued to use the name of the Chesapeake and Ohio Railway and Chesapeake and Ohio Route, and the general passenger agent said that from the time he commenced in 1882 he

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did not think the sign was ever changed. He was under the impression that the tickets had been changed after the execution of the leases, and that they were then issued in the name of the Newport News and Mississippi Valley Company, but that was a mere impression. The ticket of the plaintiff was issued by the Virginia company, and provided for a passage from Louisville to Washington. She had taken this route to and from Washington several times before, and her ticket, of the same description, had always been honored over the whole length of road between the two cities.

From all these facts it does not necessarily follow as a legal conclusion that the execution of a lease from the Kentucky to the Connecticut corporation changed the status of the former company, and effected in and of itself a change in the operation and management of that company, so that the Virginia company no longer managed or controlled the Kentucky company. The lease might exist, and the Virginia company might still manage the Kentucky company or some particular through train over that road.

Evidence was also given showing that some time after the execution of these leases, and after the happening of the accident, the Virginia company went into the hands of a receiver at the instance of Mr. Huntington, and after it came out the Connecticut corporation went out of existence, and transferred all the property which had come to it from the Virginia company back to that corporation, and during all that period there was actually no change in the manner of conducting the business of the roads other than as a matter of bookkeeping, nor in the persons who filled the offices and did the work of the companies. The Connecticut corporation simply disappeared from view. During the whole period it was the Chesapeake and Ohio Route or the Chesapeake and Ohio Road that was advertised as forming a continuous line from Washington to Louisville and carrying passengers thereon without change of cars and in a solid train.

Coming to the particular case of the defendants in error, the evidence showed that the wife purchased the ticket upon which she entered the car at Louisville; that it was a ticket headed

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"Chesapeake & Ohio Railway," and that it stated that it was good for one continuous, first-class passage from Louisville, Kentucky, to Washington, D. C., and was signed by the same person who had theretofore been the general passenger and ticket agent of the Chesapeake and Ohio Railway. The ticket contained a notice that the company acted only as agent in selling for passage over other roads; but we think it plain that a passage over a road or on a train which was controlled or managed by it would not be included in such exception. The ticket was not purchased at the regular ticket office of the company, but from what is termed in the evidence a "scalper," and was the half of a round trip or excursion ticket from Washington to Louisville and return. When Mrs. Howard came to the station at Louisville for the purpose of commencing her journey she entered the train which was lettered or had a card attached to it signifying that it was the Chesapeake and Ohio train for Washington, and she supposed she was on a train of that company, and after entering the sleeping car she surrendered her ticket to the conductor, and the same was received as a good and sufficient ticket entitling her to transportation from Louisville to Washington. After the accident happened, and while she was on her way to Washington in the train which had been procured for the passengers, she was attended by a doctor, who stated that he was the chief of the corps of surgeons of the Chesapeake and Ohio Railway, and when she told the doctor she was afraid she would lose her position on account of the injury, she testified that the doctor said to her, "The company will see you through," and although he did not say the Chesapeake and Ohio Railway Company, yet from the conversation she had with him she understood that it was that company for which he spoke.

Other evidence was given on this subject which it is not necessary to refer to, and when the judge came to charge the jury he stated upon this point as follows:

"It is not enough, to render the defendant liable or to justify you in finding that it was operating the road, to find that it sold tickets over it. If the defendant simply sold a through ticket from Louisville to Washington, or sold a round-trip ticket from

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Washington to Louisville and return to Washington, and the plaintiff, Mrs. Howard, had the return part of that ticket, that alone would not be sufficient evidence to establish the fact that the Chesapeake and Ohio Railroad Company was operating this Elizabethtown, Lexington and Big Sandy road. We all know that railroad companies habitually sell tickets over their own roads and, in connection with them, over other roads, so that the mere sale of such a ticket, and that in itself would not be sufficient. It must appear from all the evidence to your satisfaction, not only that this defendant sold a ticket over that road, upon the faith of which this lady was riding at the time, but in order to hold the defendant liable you should find that the Chesapeake and Ohio Railroad Company, as a corporation, by its officers and agents, was operating this road; that that corporation, the Chesapeake and Ohio Railroad Company, controlled this road, operated it, ran it, and that the trains which ran over it were the trains of the Chesapeake and Ohio Railroad Company; that they were manned by their employés and controlled by their officers and agents; and, unless you find that the evidence establishes that state of facts, you would find for the defendant upon that point, because, in order to render the defendant liable for this accident, if it was caused by negligence, it must appear to your satisfaction by a preponderance of evidence that the Chesapeake and Ohio Railroad Company controlled and were running its trains over this road.

"Perhaps I may aid you a little further upon that question without touching upon your province, for the fact is all for you. There is evidence here tending to show that state of facts. The plaintiffs claim that the evidence is sufficient to establish it; that is, the Chesapeake and Ohio Railroad Company controlled this particular road, and was running trains over it at the time of this accident. The defendant denies that the evidence is sufficient to establish those facts, and it is for you to determine which one of them is right in relation to it. The defendant also says that even if the evidence is sufficient to establish that state of facts at any time, that state of facts did not exist at the time of this accident; that it was ended in January, 1886, some months prior to this accident, by the lease which the Elizabeth-

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town, Lexington and Big Sandy Railroad Company made to the Newport News and Mississippi Valley Railroad Company. That lease is in evidence. I suggest that you divide that subject into two heads. First, determine whether the evidence is sufficient, when you take it all together, to establish to your satisfaction the fact that the defendant here, the Chesapeake and Ohio Railroad Company, was controlling and running the Elizabethtown, Lexington and Big Sandy road prior to the execution of this lease to which I have just referred. If you find the evidence insufficient to establish that, you might dismiss that subject, I should say, without looking any further, and find for the defendant. But if you find from the evidence that the Chesapeake and Ohio Railroad Company, immediately before the execution of this lease just mentioned, was operating and controlling this Elizabethtown road, then you would naturally pass to the next step, which is, whether the execution of this lease and the facts and circumstances attendant upon it ended that arrangement, so that the Chesapeake and Ohio Railroad Company ceased at the time of the execution of that lease to control and run the trains upon that road."

We think this charge was in substance correct, although we do not suppose it was necessary, in order to hold the Virginia company liable, that it should have had the complete control and management of the road of the Kentucky corporation. If it had the control and management of that train it would have been sufficient, even though the Kentucky or the Connecticut company managed and controlled other and local trains over the road of the Kentucky company.

The point would be whether there was evidence enough to submit the question to the jury as to the management and control of the train by the plaintiff in error. Upon a careful consideration of the whole case and all the various circumstances prior to and connected with the making of these leases, we think there was evidence sufficient to allow the jury to pass upon that question as one of fact, and the decision of the jury in favor of the plaintiff ought not to be disturbed.

The circumstances of the case are quite unusual. The evidence shows that in each of the three corporations there was

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but one controlling and guiding hand; that all the steps taken were steps in the direction of establishing, organizing and maintaining a continuous line of road from one ocean to the other, and that the various contracts, arrangements and leases were but means to accomplish this one purpose; that the Virginia company, under the guidance and direction of Mr. Huntington, held itself out to the world as a carrier or transporter and not a mere forwarder of passengers from Washington to Louisville or the reverse, and that it issued tickets as evidence or tokens of its contract to so carry. The mere formal existence of these leases does not change the actual facts in the case. Assuming their validity, they are not conclusive against the defendants in error. They could exist, and the train in question in this case might still have been under the general control of or managed by the Virginia corporation. If so, it was responsible for the neglect of the agents employed by it. The fact that the Kentucky road had immediately prior to the lease been in the actual control and management of the Virginia company, when taken in connection with the other evidence in the case, is an important one in determining the main question as to the continuation of such management of the road or of the train after the execution of the lease to the Connecticut corporation. In our judgment a submission of the question as one of fact for the jury was not error.

Another question was argued relating to the alleged release of the cause of action by Mrs. Howard upon the payment of two hundred dollars. The evidence adduced by the plaintiffs in regard to the release was sufficient, if believed, to render it unavailable as a defence. The question was submitted to the jury under instructions quite as favorable to the defendant as it was entitled to, and the finding in favor of the invalidity of the paper ought not to be disturbed.

We have carefully examined the other questions made by the plaintiffs in error, including that in regard to the want of jurisdiction because of an alleged insufficient service of process, but we are satisfied that no error has been committed, and the judgment must, therefore, be

Affirmed.

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CASTNER *v.* COFFMAN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 113. Argued January 23, 24, 1900. — Decided May 21, 1900.

On the facts as detailed in the opinion of the court, it is *held* that there was no error in the decree of the court below.

THIS suit was commenced on March 12, 1897, in the United States Circuit Court for the District of West Virginia, sitting in equity. On the date mentioned a bill of complaint was filed on behalf of Samuel Castner, junior, and Henry B. Curran, copartners, trading under the firm name of Castner & Curran. The defendant named in the bill was W. H. Coffman, doing business under the name of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company. The relief prayed was substantially that the defendant might be perpetually restrained from using or imitating the name Pocahontas in connection with the selling, advertising or offering for sale, of coal. The relief thus asked for was based upon the averment that the word Pocahontas was a trademark for coal, which trademark was owned by the complainant firm, and besides that the word in question had come in the course of business to designate the coal offered for sale by the complainants, and that the use of the name by the defendant was calculated to deceive the public into believing that the coal dealt in by him was coal which had been inspected and graded by the complainants, and would thus operate to defraud the complainant, and constituted undue and unlawful competition in trade.

Affidavits and exhibits were filed with the bill in support of a motion for an injunction. A demurrer to the bill having been overruled, the defendant filed an answer, accompanied by affidavits and exhibits in opposition to the motion for an injunction. Several affidavits in rebuttal were thereupon filed on behalf of the complainants. Upon the record thus made the motion for

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an injunction was heard, and, after consideration by the court, it was decreed as follows:

"That the defendant in his own name, and in the name of the Pocahontas Coke and Coal Company, and in the name of the W. H. Coffman Coke Company, and his servants, attorneys, associates, confederates, agents and workmen, and each and every of them, be and the same are restrained and inhibited from using the name 'Pocahontas' or 'Pocahontas Flat Top' in connection with his business, the court being of the opinion that the complainants have a right to use the said word 'Pocahontas' for the purpose of indicating that the coal was from the Pocahontas field, and that the complainants have the sole right to use said word as indicating the character of coal they sell. But this injunction is not to restrain or inhibit the defendant or his agents from advertising, offering for sale or selling coal from what is known in Virginia, or West Virginia, as the Pocahontas coal field, or advertising the coal as so mined and produced from that field, and this injunction shall not apply to transactions of the defendant already concluded by actual shipments of coal."

The defendant appealed to the Circuit Court of Appeals for the Fourth Circuit. Among the assignments of error filed was the following:

"II. The court erred in rendering any decree at all until the merits of the said cause, as put in issue by the pleadings, were fully developed by proofs adduced in the proper order of chancery proceeding and practice."

The Circuit Court of Appeals reversed the decree of the Circuit Court and remanded the cause, with directions to dismiss the bill. It was held that the complainants had no trademark in the word Pocahontas; that they were not entitled to the exclusive use of that word to designate the coal sold by them, or its character or quality, but, on the contrary, that the word Pocahontas indicated coal mined in the Pocahontas coal field, and that all the producers of that region had the right to use it in common with the complainants. The court held that the proof did not show that the defendant had practiced any deception on the public or that he had perpetrated any fraud upon the ap-

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pellees. Before the mandate issued, however, a rehearing was applied for, and the reviewing court was asked to provide in the mandate, after reversing the order granting a preliminary injunction, that the parties should "proceed to take their proofs in order that the cause may thereafter be heard upon pleadings and proofs, to the end that a final decree may be entered." This petition for a rehearing was denied, the court stating:

"We are clearly of the opinion, not only that complainants below are not entitled to an injunction, but also that there is no equity in their bill, and that, therefore, it will be a useless expenditure of time and money, and cause fruitless delay, to take the evidence mentioned in the petition for a rehearing."

The cause was then brought to this court by writ of certiorari.

Mr. Arthur von Briesen and *Mr. Frederick P. Fish* for Castner. *Mr. Henry E. Everding* was on their brief.

Mr. E. B. Stocking for Coffman.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The complainants in their bill predicate their asserted right to the sole and exclusive use of the name Pocahontas, as applying to coal, upon two grounds: First, the ownership of the alleged trademark, which it is averred the complainants acquired from the Southwest Virginia Improvement Company in April, 1895; and, second, upon a use by the complainants and their predecessors in right of the word Pocahontas as a trademark or name to designate the character and the quality of the coal dealt in by them. In other words, the complainants contend that for many years prior to the period when they assert they were vested by the Southwest Virginia Improvement Company with the ownership of the alleged trademark they, as licensees of said company, used the word Pocahontas to designate the coal sold by them, to such an extent that that word, as applied to coal, came to represent in the public mind the coal of the complainants; that this continued up to the time the trademark was acquired, and from that time down to the filing of the bill.

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Whilst the propositions above stated portray the rights asserted by the complainants in their bill, in their proof and in the argument at bar, a wider contention is advanced—that is, that the complainants have a right to the name Pocahontas, not only because they acquired it whilst acting under a license from the Southwest Virginia Improvement Company and as the assignees of a trademark owned by that company, but that they have a right to the name Pocahontas independently of the existence of any such right in the Southwest Virginia Improvement Company, or of the ownership by that company of a trademark embracing that name. Without stopping to consider the conflict which is engendered by this latter view, we shall at once proceed to an analysis of the evidence in the record, for the purpose of ascertaining whether the complainants have the exclusive right claimed by them, derived either as licensees or assignees of the Southwest Virginia Improvement Company, or in any other way.

The coal which was the subject of the dealings had by the complainants as averred in their bill, was the product of what is known as the Great Flat Top coal region of Virginia and West Virginia. It is referred to in the bill of complaint as "a tract or field of smokeless bituminous or semibituminous coal." The initial operations in the development of the region were begun in 1881 by a Virginia corporation styled the Southwest Virginia Improvement Company. Some surface work was done in the fall of that year. In March, 1882, the first blast was put in what was termed the east mine; a contract was closed to run that mine one mile; also the air course and the No. 1 west mine. These mines were situated respectively east and west of a stream called Coal Branch. As early as March, 1882, a contract was made to supply coal from these mines to the Norfolk and Western Railway Company. The branch of that road to the mines, however, was not completed until March, 1883, and the first shipment of coal was made in that month. As a result of the operations referred to a mining town was located near to the mines, and was called Pocahontas. It was made a post office in 1882. It had a population in January, 1883, of one thousand souls, and was incorporated by the legis-

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lature of Virginia in 1884 under the name of Pocahontas. The Improvement Company also named its mines the Pocahontas mines, and from the beginning appears to have sold the product of its mines as Pocahontas coal.

Without minutely tracing the development of the coal field in question, it may suffice to say that either by acquiring coal lands from the Southwest Virginia Improvement Company, or from other sources, a land company, known as the Flat Top Association, became interested in lands within the coal field in question, and by 1885 several mines additional to those owned by the Southwest Virginia Improvement Company were being worked by other operators. The connection of the complainants or their predecessors with the mines or coal field in question arose as follows:

While it is alleged in the bill that "some time prior to January, 1884," Castner & Company, Limited, a corporation, "dealt in, inspected and sold coal from such region or field aforesaid," there is no proof in the record even tending to show that Castner & Company had any connection with Pocahontas coal prior to January 1, 1885. Indeed, as it will hereafter develop, the fact that they did not represent that article is clearly inferable from a statement made by them in an application for the registry of an alleged trademark.

It is established that in July, 1883, one William Lamb was the agent of the Southwest Virginia Improvement Company, at Norfolk, Virginia, and that the general sales agent of the company was one Edward S. Hutchinson, who was located in Philadelphia, at which place the general offices of the company were established. Castner & Company, Limited, became the general tidewater coal agent on January 1, 1885, for the product of all the mines then in operation in the Great Flat Top coal region, including the product of the original Pocahontas mines. This appointment was the outgrowth of an agreement entered into between the Norfolk and Western Railroad, the Southwest Virginia Improvement Company, the Flat Top Coal Company and three lessees of the latter company operating coal mines in the region referred to. This agreement was made on the 29th of December, 1884. It provided for the handling of the entire

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coal output of all the then producers, and of any subsequent operators in said region, by a general coal agent, to be appointed by the railroad company. The contract, moreover, provided for the appointment by the railroad company of another person, to be known as the general tidewater coal agent, and who was to be subject to the general direction and management of the general coal agent. It was also stipulated in the contract that the general coal agent should perform outstanding contracts of the Southwest Virginia Improvement Company for the delivery of coal. Castner & Company, Limited, were appointed the general tidewater coal agent under the agreement.

In passing, it is proper to notice the fact that the coal mined in the various collieries in operation at the date of this agreement, as is the case with the mines now being operated, was from the same seam as that mined at the original Pocahontas mines, which seam was then known as the "Nelson or Pocahontas bed, No. 3." It clearly appears from the record that prior to the date of the contract above mentioned, at a time when the predecessors of the complainants appear to have had nothing to do with the product at the Pocahontas mines, the coal mined from the Pocahontas vein had become well and favorably known as a coal of high grade. Thus, in a letter from sales agent Hutchinson, dated July 5, 1883, he states: "We are all especially pleased with the testimonial from Mr. McCarrick, and it confirms the view we have all along entertained, that the Pocahontas coal is the best steam coal in the market." So, also, in the eighth article of the contract between Castner & Company, Limited, and the railroad company, by which the former was appointed the general tidewater coal agent, it was recited that, "The coal from the Great Flat Top coal region has proved to be of superior quality, and suitable for steam purposes, and especially for the use of ocean steamships, as well as for sale in the West Indian and South American markets." That the coal supplied by the producers might, however, in some instances, be of inferior quality was recognized in a stipulation contained in the coal producers' contract, providing for an allowance to be made to purchasers of coal because of inferiority of quality, such allowance to be deducted from any amount found due or that might become due to the producer.

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While the contract between the coal producers and the agreement appointing the general tidewater coal agent are contained in the record, the agreement appointing the general coal agent was not put in evidence. One of the complainants, in an affidavit dated March 18, 1897, attached as an exhibit a monthly statement rendered by the coal agent, which is headed "Office of the General Coal Agent, Roanoke, Virginia, February 15, 1885." Nowhere in the statement however, is there an intimation as to who was such coal agent. It is plainly inferable, however, from the excerpt which we now make, who was the appointee to that responsible position. The extract we make is from the issue of October, 1891, of a publication styled, "The Iron Belt." It reads as follows:

"POCAHONTAS COMPANY.

"The Pocahontas Coal Company, organized January 1, 1895 (1885?). Officers: William C. Bullitt, president; D. H. Matson, secretary and treasurer; H. N. Claxton, general agent; John Twohy, superintendent piers, Norfolk; general office, Roanoke, Va.; branch office, Norfolk, Va.; shipping office, Bluefield, W. Va. This company, who makes all sales for the entire output of the region, assuming all liabilities, shipped during the year 1890, 1,807,716 tons, and has shipped during the present year to date (October 10th), 1,628,927 tons. 'From present indications,' says Mr. Matson, secretary of the company, 'we estimate that for the year 1891 we will ship 2,300,000 tons.'

"The Pocahontas Coal Company makes a uniform price for all coal mined, furnishes inspectors for each tipple where the coal is loaded, thus guaranteeing to purchasers coal free from bone, slate and other impurities. This company pays the operators by check the fifteenth day of each month, thus securing them against losses by reason of bad debts, storage and freight rates. The company employs twenty-six sub-inspectors, who are under the supervision of Mr. W. D. Milne, chief inspector. Mr. Milne's headquarters are at Bramwell, and he makes a tour of inspection of each tipple at least once a week."

So, also, there is contained in the record a letter, headed with the names of the then officers of what is termed "Pocahontas

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Coal Company, shippers of celebrated Pocahontas coal." On this letter head was a vignette, presumably the figure of Pocahontas. This letter was addressed to the proprietors of the Indian Ridge Colliery, and referred to the handling by the Pocahontas Coal Company of the product of that colliery. The Indian Ridge Colliery, referred to in this letter, is one of the mines represented by the defendant in this cause. The operation of this mine was commenced about the date of the letter, and its product, in accordance with the general agreement already stated, was shipped through the general coal agent, the Pocahontas Coal Company.

In the article in The Iron Belt, above referred to, there is also a statement of the production from 1883 to 1891 of the various mines controlled in October, 1891, by the Pocahontas Company, as the general coal agent of all the mine owners or operators. This statement showed that from one colliery operating in 1883 the number of collieries had increased to nineteen in October, 1891.

Under the coal producers' agreement, as we have seen, the entire product of the mines in the Great Flat Top coal region, intended for rail transportation other than that used for coke, was to be consigned to the general coal agent, and only a portion of such product was to be handled by the general tidewater coal agent, whose operations were to be "subject to the exclusive control, supervision and direction of the general coal agent."

We have already referred to the fact that when the combination referred to was formed the coal mined from the Pocahontas, or No. 3 bed, had, under that name, an established reputation. Further confirmatory evidence of this fact will now be referred to. Andrew S. McCreath, chemist to the state geological survey, of Pennsylvania, embodied the results of much research and personal investigation during part of 1882, and the fall of 1883, and the spring of 1884, in a work entitled "Mineral Wealth of Virginia," extracts from which are contained in the record. At page 110 he mentions the existence of numerous openings on the "Nelson or Pocahontas coal bed (No. 3 of the section,)" and also of some few openings

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on the upper beds, No. 5 and No. 6. He further says (p. 110):

"On Coal Branch, the Pocahontas bed (No. 3) has been extensively mined at the Pocahontas mines of the Southwest Virginia Improvement Company."

At page 150 he says:

"The section at Pocahontas shows the presence of at least three workable beds above water level, although almost the entire output of the region at present comes from the No. 3 Nelson or Pocahontas bed.

"This handsome coal bed is everywhere present, so far as explored, with a workable thickness, being 11′ 3″ in the vicinity of Pocahontas, and holding its workable dimensions through the field for five miles eastward to the waters of Flipping Creek, where it becomes split into two beds, about 4½ and 5½ feet thick.

"To the west of Pocahontas, along Laurel Creek, for a distance of eight miles, the bed carries its full thickness fairly well, and shows nearly the same section for a long distance north of the dividing ridge on the waters of the Elkhorn and the Tug Fork of Sandy.

* * * * * * * *

"The good quality of this coal has been well established by numerous tests, both in the laboratory and in actual practice."

The Pocahontas Coal Company appears to have continued to act as general coal agent of the producers' combination until the spring of 1895, about the time of the appointment of a receiver for the Norfolk and Western Railroad, which company, as will be remembered, was a party to the original agreement of the combination. By this time the development of the coal field in question had largely progressed, and a number of additional mines were being operated. A new company, called the Pocahontas Company, was chartered on March 12, 1895, and in 1896 this company was handling the coal produced from numerous mines in the Pocahontas field. Agreements were made, however, by the complainants in March, 1895, directly with some of the mine owners formerly represented by the Pocahontas Coal Company, (among them the Southwest Virginia Improvement Company,) by which agreements complain-

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ants were constituted the general factors and selling agents for the product of the mines of such owners.

The product of the Indian Ridge mine, now represented, as we have said, by the defendant, and which was opened in the spring of 1894, when it ceased to be shipped through the Pocahontas Coal Company, as general agent, was marketed through the agency of the complainants until January 1, 1896. From this last mentioned date until November 1, 1896, the product of the mine was shipped through the Pocahontas Company, the complainants having become the sole agents of the latter company for tidewater and line trade.

It is plainly inferable from the averments of the bill, as it is unquestionably established by the evidence in the record, that from January 1, 1885, the date of the coal producers' combination referred to, the product of the various collieries controlled by the combination was uniformly termed Pocahontas coal, and the evidence shows that this appellation was made use of as well upon bill heads and advertising matter of the general coal agent, and of some, at least, of the producers, as upon the stationery and advertising matter of Castner & Company, Limited, the general tidewater coal agent.

It is by the light of the facts just stated that we come to consider the claim made in the bill that the complainants are the exclusive owners of the trademark or the trade name Pocahontas, as applied to all coal coming from the Pocahontas coal field, because prior to April 1, 1895, they had used the same by the license and permission of the Southwest Virginia Improvement Company, and subsequent to that date had used it as owner under an assignment of said trademark or trade name to them from the Improvement Company. There is no evidence whatever in the record tending to show any express license to complainants or their predecessors from the Southwest Virginia Improvement Company, authorizing them to use the name Pocahontas as an exclusive trade name or trademark for coal; and the facts which we have above stated render it absolutely impossible that there should have been any such valid license. It is patent that the word Pocahontas, prior to the formation of the coal producers' combination on January 1, 1885, indicated

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all the coal coming from a particular seam of coal known as the Pocahontas vein. When the combination was entered into, creating a general coal agent to dispose of all the coal to be marketed from all the collieries which were then being worked or might thereafter be worked in the Pocahontas region, it is undoubted that the name Pocahontas was applied by everybody concerned, including the Southwest Virginia Company, as indicating coal coming from the region, without reference to the particular mine from which it was taken, for all the coal was advertised by the owners and general coal agent under the name of Pocahontas coal, and was contracted for and shipped under the same name. Indeed, during the existence of the original combination the complainants, or their predecessors, who now assert that they have an exclusive right to the name Pocahontas as designating the coal sold by them, were acting as tidewater agents under the supervision and control of the general coal agent, for all the mine owners, and were themselves selling the coal under the name referred to as agents of the owners, and dealing in such coal, on behalf of the owners of all the mines, as Pocahontas coal. When the Pocahontas Coal Company ceased to act as the general coal agent, on the appointment of a receiver of the Norfolk and Western Railroad, the complainants, who now assert the exclusive right in themselves to the name Pocahontas, became the principal agent for the sale of the coal from some of the mines, among the number one of the mines controlled by the defendant, putting the product of that mine upon the market, as agent of the owner, as Pocahontas coal.

Destructive as is this state of the proof of the assertion that there was a license to the complainants prior to 1895 by the Southwest Virginia Improvement Company, the existence of such a license is further rebutted by the fact that there is no evidence of any want of knowledge by the Southwest Virginia Improvement Company of the use by the Pocahontas Coal Company or by the producers generally of the designation Pocahontas as the name of the coal mined in any and all of the collieries in operation in the region. Indeed, the exaggerated character of the assertion of the complainants, that prior to 1895 they

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used the trademark as the licensees of the Improvement Company, is shown by the record. In August, 1885, Castner & Company, Limited, was under the contract the general tidewater coal agent, that is, such agent for all the mine owners in the Pocahontas region. Although thus representing the owners, this corporation, on the 25th of August, 1885, filed an application for the registry of a trademark, in which it was recited that Castner & Company, Limited, had adopted for its use as a trademark for coal the word "Pocahontas," and that the same had been continuously used by said corporation "since about January 1, 1885." This date, it will be remembered, was when the corporation referred to became the general tidewater coal agent for the producers of Pocahontas coal. In an affidavit deposing to the truth of the statements contained in the application, it was stated:

"That said corporation (Castner & Co., Limited,) has a right to the use of the trademark therein described; that no other person, firm or corporation, has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive."

The conflict between the claim of license made in the bill and these sworn assertions in the application to register a trademark requires no comment. The record, however, shows a further contradiction. Turning to Exhibit B, attached to the bill, which is the alleged assignment of trademark made in 1895 by the Southwest Virginia Improvement Company to Castner & Company, Limited, and under which complainants claim to be the owners of the trademark Pocahontas, as applied to all coal, we find it recites that Castner & Company, Limited, had been appointed on March 26, 1895, the agents to sell all the output of coal of the mines of the Improvement Company, which coal "has become known under the trade name, or mark, 'Pocahontas,' by adoption and continuous use thereof by the said corporation, the Southwest Virginia Improvement Company." Besides this, the document states that the assignor, the Southwest Virginia Improvement Company, "did adopt, on or about the first day of July, 1882, as a trade name, or mark, the word 'Pocahontas' for coal mined in a region or

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field opened up and operated in Tazewell County, Virginia, in the year 1882, by the said corporation, the Southwest Virginia Improvement Company, and which trade name, or mark, it continued to use thereafter in its coal mining operations in said region, or field, from the date aforesaid, as the trade name, or mark, for all coal mined and sold by it up to the present time."

Thus we have Castner & Company, Limited, becoming by contract an agent of the mine owners to sell their coal, putting it upon the market as Pocahontas coal, and dealing with it as such, yet filing a claim for a trademark by which it was sought to deprive the owners of the designation which appropriately belonged to their product. We find the bill verified by both complainants, one of whom made oath to the application for a trademark. In such bill it is asserted that at the time the trademark was applied for Castner & Company, Limited, were not the owners of the trademark, but were mere licensees of the Southwest Virginia Improvement Company.

And also it appears that, when in 1895 the complainants became the principal agents of certain of the mine owners, a monopoly of the name of Pocahontas as against all the mine owners was again sought to be obtained by taking a transfer of an alleged trademark or name from the Southwest Virginia Improvement Company, the statements in the paper reciting such transfer being in irreconcilable conflict with the affidavit to the application for a trademark.

But putting out of mind these contradictions, it is manifest that, long prior to the purported assignment by the Southwest Virginia Improvement Company of the alleged trademark or trade name, by the acts of all the parties concerned in the production and marketing of the coal, (including the Southwest Virginia Improvement Company, Castner & Company, Limited, and the complainants,) the name Pocahontas indicated the region from which the coal in question came and the natural quality thereof, and applied indiscriminately to the product of all the mines in that region, producing that character of coal.

Although the facts which we have referred to make inevitable the foregoing deductions, nevertheless we state a few additional facts which make the situation if possible yet clearer.

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Opinion of the Court.

In the issue of October, 1891, of The Iron Belt, already referred to, the region in question was termed the Pocahontas Flat Top coal region, and the product thereof was frequently referred to as Pocahontas coal or Pocahontas Flat Top coal. So, also, in the agreements made by complainants in March, 1895, (after the producers' combination had ceased to be operative,) to act as sales agent for the product of certain of the mines, there is contained express recognition of the fact that the products of all the mines in that region, whether those products were inspected and controlled by the complainants or not, were usually designated and generally known as Pocahontas coal. Thus, in a stipulation numbered 3 in an agreement made by complainants with the Pulaski Iron Company on March 26, 1895, it is recited:

"It is agreed by the parties hereto that the parties of the second part may act as selling agents for other producers of Pocahontas coal, provided they shall become and continue to be the exclusive agents of such producers, and provided further that the aggregate amount of coal sold during any year for the party of the first part shall be less than 2.615 per cent of the total amount of Pocahontas coal sold by the parties of the second part during that year."

And in a supplementary agreement with the same company, dated December 28, 1895, it is said:

"That, until the expiration of the said contract of 26th March, 1895, according to the terms thereof, the party of the first part will sell or dispose of no Pocahontas coal whatever save through the agency of the parties of the second part.

* * * * * * * *

"The parties of the second part hereby promise and agree that in the event of the sale or disposition of any Pocahontas coal by any producer for whom they may at any time be acting as sales agent, except through the agency of the said parties of the second part, that they will at once, on receipt of written notice of the particulars of such sale or disposition from the party of the first part, and upon its written request, forthwith terminate its agency for such producer," etc.

Again, in a supplement to The Daily Telegraph, a publication

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at Bluefield, West Virginia, such supplement being entitled "Pocahontas Flat Top Coal Field Industrial Edition," the product of the region referred to is frequently spoken of as Pocahontas coal or Pocahontas coke, etc. And, as bearing upon the claim made in the bill, that the coal from this field had acquired a great reputation in the markets of the world by reason of the expenditures of time and money made by complainants "in inspecting, selecting, grading and otherwise maintaining the superior quality and purity of the said coal," we call attention to a lengthy advertisement of the complainants contained in the publication just referred to, in which appeared no allusion to an inspection of the product, but wherein it was clearly recognized that the wide reputation of Pocahontas coal was the result of making known the inherent excellent quality of the article itself. The product of the mines represented by the complainants, among which mines was the Indian Ridge mine, now represented by the defendant, is frequently referred to in the card as Pocahontas coal. We excerpt portions of the card in the margin.[1]

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[1] "CASTNER & CURRAN

Are the General Agents for the sale of

Pocahontas Flat Top Smokeless Semi-Bituminous Coal.

"Having satisfied themselves by exhaustive analyses and tests that POCAHONTAS COAL was unequaled as a Steam Fuel, they determined to leave nothing undone to demonstrate this fact and establish its reputation as second to no other coal, and owing to their energetic efforts and judicious advertising, POCAHONTAS COAL to-day enjoys the unique distinction of being the only coal in the world that has been officially indorsed by the Governments of Great Britain and the United States. It is always used in testing the speed of Government cruisers built on the Atlantic seaboard, the Secretary of the Navy having issued an order to this effect several years ago. The Cunard and White Star Steamship Companies use it exclusively on their Eastern voyages, and with it have made all their great speed records of recent years. It is conceded to be the Best Fuel for Locomotives and Stationary Engines, and its supremacy as a Steam Fuel is now established beyond dispute.

"THE RECORD OF POCAHONTAS COAL IS THE MOST REMARKABLE IN THE HISTORY OF THE TRADE.

"The first mine was opened in 1883, the shipments for that year amounting to only 75,000 tons.

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Now, this advertisement of the complainants makes it clear that they were offering for sale, not the particular product of any one mine, but that the Pocahontas coal which they advertised was derived from numerous collieries within the Pocahontas region. Indeed, when it is considered that coal from the Indian Ridge mine, which the defendant now represents, was for a time represented by the complainants, and the coal therefrom sold by them as Pocahontas coal, the contention now advanced amounts but to this, that an agent can deprive the principal of his property by appropriating it to himself, and that complainants, because they were entrusted, first, in a subordinate capacity as tidewater agents by many of the mine owners and then in a more enlarged capacity as general agent, with power to represent and act for the producers, have come into the position where they can virtually exercise a monopoly of sale as to the product of all the mines in the Pocahontas region by compelling every mine owner in the Pocahontas field to offer no coal on the market unless the description be qualified or unless the coal be confided for sale to the complainants.

It is insisted, however, that the appellate court should have complied with the request contained in the petition for a rehearing, and remanded the cause to permit further proofs in support of the material allegations of the bill. In *Mast, Foos & Co.* v. *Stover Manufacturing Co.*, 177 U. S. 495, we considered the question as to the power of a Circuit Court of Appeals, in reviewing the action of a Circuit Court in allowing a temporary injunction *pendente lite*, upon affidavits, to consider the case upon the merits and direct a final decree dismissing the bill. It was held that the propriety of the exercise of such a power must be determined from the circumstances of the particular case. And it was added:

"In 1895 there were thirty-eight collieries in operation, whose output (including tonnage converted into coke) aggregated 3,500,000 tons.

"Not only is this coal famous for the immense growth of its tonnage, but its reputation has also increased, until to-day it enjoys the distinction of having been officially indorsed as the *best American steam coal by the United States Navy Department, the United States War Department, the British Minister at Washington, all the leading steamship, railroad and manufacturing companies*," etc.

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"If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy, or because under the particular circumstances of the case it should not have been granted; or if other relief be possible, notwithstanding the injunction be refused, then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. *But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment;* or if the patent manifestly fail to disclose a patentable novelty in the invention, we know of no reason why, to save a protracted litigation, the court may not order the bill to be dismissed."

As respects the case at bar, we are satisfied from the averments of the bill and the proof that no supplementary evidence could be offered which would alter the indubitable conclusion that no exclusive right to the trademark or trade name Pocahontas exists in the complainants. Further, we concur in the conclusion of the Circuit Court of Appeals, that the bill, upon its face, is devoid of equity. It is fairly to be inferred from the averments of the bill that it charges that while acting as agents of the owner of one of the mines represented by the defendant, and of the owners of many other mines in the same region or field, there was applied by the complainants to the product of all the mines the appropriate designation Pocahontas coal, a description which applied to all the coal produced by the operators in that region, and which was correctly descriptive of such product. Whether, as claimed, the reputation of the coal was enhanced by careful inspection and grading by the complainants or their predecessors, is left conjectural by the record. But if it be conceded that the proof on this branch of the case was certain, it could operate no change of result. In inspecting and grading the coal, complainants and their predecessors were but agents of the mine owners. Certainly, the agent cannot be heard to say that he may appropriate to himself the name belonging to the product of his principal, or that he may affix the name to coal for his own purposes, and not for the benefit and advantage of his principal.

Keeping in mind the circumstances under which the com-

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plainants made whatever use they did make of the appellation "Pocahontas," as applied to coal produced from the Pocahontas coal region, we can perceive no just ground for the claim that there was unfair competition in trade, by reason of the acts averred to have been committed by the defendant. In substance, the alleged wrongful acts were averred to consist in the advertising in various forms by the defendant of the coal handled by him, as "Pocahontas" coal, when in fact such coal is a "very inferior and very impure coal." It was also averred, *in the alternative*, that such acts were done with the intent to cause the purchasers of said coal to believe "that the same was sold by your orators, or is *of the quality* of that sold by your orators." The effect of the advertising of the coal handled by the defendant, as "Pocahontas" coal, it is also asserted, is that purchasers of the coal dealt in by the defendant are liable to and will be deceived by such representations into purchasing such coal "as your orators' superior and specially selected coal." It is further averred that purchasers have in fact been so deceived, and that the "reputation of your orators' 'Pocahontas' coal has thereby been tainted." Leaving out of view the emphatic denial of the defendant, that the coal handled by him is in anywise inferior to that handled by the defendant, it is plain from the averments in the bill that the alleged inferiority in the coal is grounded upon the supposition of a want of careful inspection and grading. We do not think, however, that if it were a fact that it had become generally known and recognized by the public that the complainants, while in the employ of the coal producers of the Pocahontas coal field, inspected and graded the product of the mines in such manner as that thereby the reputation of the coal was enhanced, that the owners of mines producing Pocahontas coal thereby lost their right to designate their coal by its appropriate name, because of the possibility that some person, by reason of the coal being termed what it really was, might be induced to believe that it was still inspected by complainants.

As we have already said, in its final analysis, the right which the complainants assert amounts but to the contention that because at one time they were the agents of the owners of coal

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mined from the Pocahontas field, and had sold the same as agents for the owners under its correct name, they thereby divested the owners of their property, and have acquired a monopoly of selling all the coal from the Pocahontas field under its appropriate name. We think there was no error in the decree of the Circuit Court of Appeals, and it is therefore

Affirmed.

CLARKE *v.* CLARKE.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 216. Argued April 9, 10, 1900. — Decided May 21, 1900.

It is a doctrine firmly established that the law of a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy.

The courts of a State where real estate is situated have the exclusive right to appoint a guardian of a non-resident minor, and vest in such guardian the exclusive control and management of land belonging to said minor, situated within the State.

THIS writ of error was procured for the purpose of obtaining the reversal of a judgment of the Supreme Court of Errors of the State of Connecticut, which, as respected real estate situated in the State of Connecticut, refused to follow and apply a judgment of the Supreme Court of South Carolina interpreting and construing the will of Julia H. Clarke.

The facts from which the legal questions presented arise are as follows:

Henry P. Clarke and Julia Hurd intermarried in New York in 1886, and immediately thereafter went to South Carolina, where they afterwards continuously resided. Mrs. Clarke died on February 10, 1894, owning real and personal property in South Carolina, and also real estate situated in Connecticut. Two daughters survived, one, Nancy B., aged five years, the other, Julia, aged about two months.

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Statement of the Case.

A will and codicil executed by Mrs. Clarke were duly established in the court of probate for Richland County, in the State of South Carolina. The will contained the following provisions:

"Fifth. The rest, residue and remainder of my estate, real and personal, of whatever description or wheresoever situated, I give, devise and bequeath as follows: One half thereof to my husband, Henry P. Clarke, and one half thereof to my said husband in trust for my daughter, Nancy, until she becomes twenty-five years of age, and then to pay the whole sum over to her. But if she shall marry before that age with the consent and approval of her father, or in case of his death, with the consent and approval of her then guardian, then I direct that one half of her share shall be paid to her upon her marriage and the other half when she becomes twenty-five.

"In case I shall leave surviving me one or more children beside my daughter Nancy, then I direct that the said rest, residue and remainder of my estate shall be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing per capita, and the shares of said children to be held in trust as above provided in the case of Nancy as being the only one.

"And I give, devise and bequeath the said rest, residue and remainder as aforesaid, to each and to their heirs and each of them forever."

The infant daughter Julia died shortly after her mother, in the month of May, 1894, owning no property in Connecticut except such as had devolved on her under the will of her mother.

Henry P. Clarke, as executor of the last will and testament of his wife, Julia H. Clarke, and trustee of the estate of Nancy B. Clarke, his infant daughter, brought suit in June, 1895, against said Nancy B. Clarke, in the Circuit Court for the Fifth Judicial Circuit of South Carolina, praying for the "judgment and direction of the court in regard to the true construction of said will, and especially the fifth and residuary paragraph thereof, and as to his powers and duties as such executor and trustee under said will in the premises, and for such further relief as may be just and proper."

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Statement of the Case.

A guardian *ad litem* was appointed for the infant defendant, who duly answered, and, after hearing, the court decreed that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated; that the plaintiff as executor should receive, administer and account for the same as personalty; that he was, by the said will, authorized and empowered to sell and convey the same for the purpose of executing the will, and leave was given to apply for further orders and directions upon the foot of the decree. This judgment was, upon appeal, affirmed by the Supreme Court of South Carolina. 46 South. Car. 230.

The controversy in the courts of Connecticut was commenced by the filing, in the probate court for the district of Bridgeport, of a petition on behalf of Henry P. Clarke as administrator of the estate of his deceased daughter Julia Clarke, he having been appointed such administrator by the proper court in Connecticut. In the petition it was recited that Julia had died intestate, leaving *real estate* in the district, and that divers persons claimed to be entitled to have the said real estate set apart and distributed to them, and the court was asked to hear the claims of said parties and ascertain to whom the estate should be apportioned. A guardian *ad litem* having been appointed by the court for Nancy B. Clarke, the application was heard, and a decree was entered finding that she was the sole heir and distributee of her deceased sister Julia. The Connecticut law, which devolved on Nancy the whole of the real estate of Julia, differed from the law of South Carolina, by which the estate of Julia, both real and personal, passed equally to the father and to Nancy the surviving sister.

Henry P. Clarke, individually, appealed from the decision of the probate court to the Superior Court of the county of Fairfield. That court filed its findings stating the facts concerning the controversy, and reserved the resulting questions of law to the Supreme Court of Errors of the State, which court recommended that the decree of the probate court be affirmed. 70 Conn. 195. Thereupon the Superior Court of Fairfield County entered a decree in conformity to the mandate to it directed.

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Opinion of the Court.

In the body of the decree the court referred to the contention between the parties, and stated the one pertinent to the issue now before us, as follows:

"Upon the facts aforesaid the appellant claimed and contended that the decision and decree of the Circuit Court for the Fifth Judicial Circuit of the State of South Carolina, being the Court of Common Pleas and general sessions for Richland County, affirmed by the Supreme Court of said State, 46 South Car. 230, in the case of Henry P. Clarke, executor and trustee, against Nancy B. Clarke, in its interpretation and construction of the will of the said Julia H. Clarke, to the effect that said will worked an equitable conversion into personalty at the time of her death of all the real estate of the testatrix, wherever situated, was binding and conclusive on the courts of this State in his favor in this proceeding, and that to hold otherwise would be to deny full faith and credit to the judicial proceedings and judgment of the State of South Carolina, and would be in contravention of section 1, article 4, of the Constitution of the United States."

An appeal was taken from the decree of the Superior Court. The Supreme Court of Errors of Connecticut, although it remarked that the appeal was unnecessary, as its prior judgment had settled the controversy between the parties, yet entertained the appeal, and affirmed the decree below. 70 Conn. 483.

Mr. Samuel F. Phillips and *Mr. Leroy F. Youmans* for plaintiff in error. *Mr. Frederic D. McKenney* was on *Mr. Phillips's* brief.

Mr. John H. Perry for defendants in error. *Mr. Winthrop H. Perry* was on his brief.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The Supreme Court of Errors of Connecticut held that the will of Julia H. Clarke, wife of the plaintiff in error, did not at the time of her death work an equitable conversion into per-

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sonalty of the real estate situated in the State of Connecticut, and, consequently, that though personal property might be governed by the law of the domicil, real estate within Connecticut was controlled by the law of Connecticut, and hence that Nancy B. Clarke, as surviving sister of Julia Clarke, inherited, under the laws of Connecticut, to the exclusion of the father, the interest of the deceased sister Julia in the real estate in Connecticut which had passed to Julia by the will of her mother. It is assigned as error that in so deciding the Connecticut court refused full faith and credit to the decree of the courts of South Carolina, wherein it was adjudged that the will of Mrs. Clarke had the effect of converting her real estate, *wherever situated*, into personalty; the deduction being that as under the South Carolina decision the real estate situated in Connecticut became personal property, it was the duty of the Connecticut court to have decided that the land passed by the law of South Carolina and not according to the law of Connecticut, and hence, that instead of treating the daughter Nancy as the owner of the whole of the real estate, it should have recognized the father as having a half interest therein. And the correctness of this proposition is really the only question which the assignment of errors presents for our decision.

The argument at bar has taken a wide range, and the various legal principles by which it was deemed that a solution of the controversy might be facilitated have been supported by a very elaborate reference to authority. We do not deem it necessary, however, to critically review the cases cited and the observations of text writers which were relied on in argument, nor to analyze all the contentions which it is asserted those authorities sustain. We say this, because, in our opinion, the matter at issue may be disposed of by the application of two well defined and elementary legal principles.

It is a doctrine firmly established that the law of a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy. This familiar rule has been frequently declared by this court, a recent statement thereof being contained in the opinion delivered in *De Vaughn* v. *Hutchinson*, 165 U. S. 566, where the court said (p. 570):

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"It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances. *United States* v. *Crosby*, 7 Cranch, 115; *Clark* v. *Graham*, 6 Wheat. 577; *McGoon* v. *Scales*, 9 Wall. 23; *Brine* v. *Insurance Co.*, 96 U. S. 627."

Now, in the case at bar, the courts of Connecticut, construing the will of Mrs. Clarke, have declared that, by the law of Connecticut, land situated in that State, owned by Mrs. Clarke at her decease, continued to be, after her death, real estate for the purpose of devolution of title thereto. The proposition relied on, therefore, is this, although the court of last resort of Connecticut (declaring the law of that State) has held that the real estate in question had not become personal property by virtue of the will of Mrs. Clarke, nevertheless it should have decided to the contrary, because a court of South Carolina had so decreed. This, however, is but to argue that the law declared by the South Carolina court should control the passage by will of land in Connecticut, and therefore is equivalent to denying the correctness of the elementary proposition that the law of Connecticut where the real estate is situated governed in such a case. It is conceded that, had the will been presented to the courts of Connecticut in the first instance and rights been asserted under it, the operative force of its provisions upon real estate in Connecticut would have been within the control of such courts. But it is said a different rule must be applied where the will has been presented to a South Carolina court and a construction has been there given to it; for, in such a case, not the will but the decree of of the South Carolina court, construing the will, is the measure of the rights of the parties, as to real estate in Connecticut. The proposition, when truly comprehended, amounts but to the contention that the laws of the respective States controlling the transmission of real property by will, or in case of intestacy, are operative only, so long as there does not exist in a foreign jurisdiction a judgment or decree which in legal effect has changed the law of the situs of the real estate. This is but to contend that what cannot be

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done directly can be accomplished by indirection, and that the fundamental principle which gives to a sovereignty an exclusive jurisdiction over the land within its borders is in legal effect dependent upon the non-existence of a decree of a court of another sovereignty determining the status of such land. Manifestly, however, an authority cannot be said to be exclusive, or even to exist at all, where its exercise may be thus frustrated at any time. These conclusions are not escaped by saying that it is not the law of Connecticut which conflicts with the interpretation of the will adopted by the South Carolina court, but the decision of the court of Connecticut which does so. In this forum, the local law of Connecticut as to real estate is the law of that State as announced by the court of last resort of that State.

As correctly observed in the course of the opinion delivered by the Supreme Court of Errors of Connecticut, the question as to the operative effect of the will of Mrs. Clarke, upon the status of land situated in Connecticut, was one directly involving the mode of passing title to lands in that State. This resulted from the fact that if the will worked a conversion into personalty immediately upon the death of Mrs. Clarke, as contended, it necessarily vested her executor with authority at once to sell and convey the real estate in Connecticut by a deed sufficient, under the laws of that State, to transfer title to real estate—a power which was held by the courts of Connecticut not to have been conferred. Had the executor assumed to exercise such a power, however, the validity or invalidity of a conveyance thus executed would have been one exclusively for the courts of Connecticut to determine, just as would have been the question of the sufficiency of the will to vest title. Such being the case, there is no basis for the contention that it was not the exclusive province of the courts of Connecticut to determine, prior to the execution of such a conveyance, whether or not the power to do so existed.

As further observed by the Connecticut court, whether Mr. Clarke, as executor and trustee under the will of his wife, had any power, duty or estate with respect to lands situated in Connecticut, depended upon the laws of that State. The courts of

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the domicil of Mrs. Clarke could properly be called upon to construe her will so far as it affected property which was within or might properly come under the jurisdiction of those tribunals. If, however, by the law as enforced in Connecticut, land in Connecticut owned by Mrs. Clarke at her decease was real estate for all purposes, despite the provisions contained in her will, that land was a subject-matter not directly amenable to the jurisdiction of the courts of another State, however much those courts might indirectly affect and operate upon it in controversies, where the court, by reason of its jurisdiction over persons and the nature of the controversy, might coerce the execution of a conveyance of or other instrument incumbering such land.

And the cogency of the reasons just given is further demonstrated by considering the case from another though somewhat similar aspect. The decree of the South Carolina court, which, it is contended, had the effect of converting real estate situated in Connecticut into personal property, was not one rendered between persons who were *sui juris*. Nancy B. Clarke, one of the parties to the suit in South Carolina, and whom the Connecticut court has held inherited, to the exclusion of the father, under the laws of Connecticut, the whole of the real estate belonging to her sister, was a minor. She was therefore incompetent, in the proceedings in South Carolina, to stand in judgment for the purpose of depriving herself of the rights which belonged to her under the law of Connecticut as to the real estate within that State. Neither the executor or trustee under the will, or the guardian *ad litem*, or any other person assuming to represent the minor in South Carolina, had authority to act for her *quo ad* her interest in real estate beyond the jurisdiction of the South Carolina court, and which was situated in Connecticut.

It cannot be doubted that the courts of a State where real estate is situated have the exclusive right to appoint a guardian of a non-resident minor, and vest in such guardian the exclusive control and management of land belonging to said minor, situated within the State. This court had occasion to consider and pass upon this doctrine in the case of *Hoyt* v. *Sprague*, 103 U. S. 613, and, in the course of the opinion, it was said (p. 631):

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"One of the ordinary rules of comity exercised by some European States is to acknowledge the authority and power of foreign guardians, that is, guardians of minors and others appointed under the laws of their domicil in other States. But this rule of comity does not prevail to the same extent in England and the United States. In regard to real estate it is entirely disallowed; and is rarely admitted in regard to personal property. Justice Story, speaking of a decision which favored the extraterritorial power of a guardian in reference to personal property, says: 'It has certainly not received any sanction in America, in the States acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local; and not as entitling them to exercise any authority over the person or personal property of their wards in other States, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators.' (Story, Confl. Laws, secs. 499, 504, 504*a*. And see Wharton, Confl. Laws, secs. 259–268, 2d ed.; 3 Burge, Colon. & For. Laws, 1011.) And some of those foreign jurists who contend most strongly for the general application of the ward's *lex domicilii* admit that, when it comes to the alienation of foreign assets, an exception is to be made in favor of the jurisdiction within which the property is situate, for the reason that this concerns the ward's property, and not his person. (Wharton, secs. 267, 268)."

Of what efficacy, however, would be the power of one State to control the administration, through its own courts, of real estate within the State, belonging to minors, without regard to the domicil of the minor, if all such real estate could be disposed of and the administration thereof be controlled by the decree of the court of another State. Here, again, the argument relied on must rest upon the false assumption that an exclusive power which confessedly exists in the courts of one jurisdiction may be wholly destroyed or rendered nugatory by the action of the courts of another jurisdiction in whom is vested no authority whatever on the subject. It results that no person before the South Carolina court, assuming to speak for the estate of Nancy B. Clarke, represented any real property of said Nancy which

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was not within the territorial jurisdiction of South Carolina, and the decree, therefore, could not affect land in Connecticut, an interest which was not before the court.

When, therefore, Henry P. Clarke, as administrator, appointed in Connecticut, of the estate of his deceased daughter, Julia Clarke, applied to the Connecticut probate court to determine who was entitled to the "real estate" owned by the intestate, it was the province of the Connecticut court to decide such question solely with reference to the law of Connecticut. Its power in this regard was not limited by the fact that in order to determine who owned the real estate, it was necessary for the court to construe the will of the mother of the intestate, and to determine what effect it had upon the status of the real estate under the law of Connecticut. Having a right to decide these questions, it was not constrained to adopt the construction of the will which had been announced by the court of South Carolina. From these conclusions it follows that because the court of Connecticut applied the law of that State in determining the devolution of title to real estate there situated, thereby no violation of the constitutional requirement that full faith and credit must be given in one State to the judgments and decrees of the courts of another State, was brought about, as the decree of the South Carolina court, in the particular under consideration, was not entitled to be followed by the courts of Connecticut, by reason of a want of jurisdiction in the court of South Carolina over the particular subject-matter which was sought to be concluded in Connecticut by such decree. *Thompson* v. *Whitman*, 18 Wall. 457; *Cole* v. *Cunningham*, 133 U. S. 107; *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, 137 U. S. 287; *Simmons* v. *Saul*, 138 U. S. 439; *Reynolds* v. *Stockton*, 140 U. S. 254; *Cooper* v. *Newell*, 173 U. S. 555.

Judgment affirmed.

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BROWNING *v.* DE FORD.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 245. Argued April 16, 17, 1900.—Decided May 21, 1900.

General creditors attaching the goods of an insolvent debtor upon the ground that they had been purchased under fraudulent representations, when sued by chattel mortgagees of said debtor, may attack the mortgage by showing that the mortgagees knew that the goods had been fraudulently purchased.

THIS was an action in the nature of trover by the surviving partners of the firm of Henry W. King & Company, and four other creditors, as chattel mortgagees, against Charles H. De Ford, sheriff of Oklahoma County, to recover the value of a stock of goods seized by the defendant and sold under writs of attachment issued against the property of the firm of W. F. Wolfe & Son, in suits instituted by general creditors of that firm.

Defendant justified under these writs of attachment, and alleged that the indebtedness of each of the attaching plaintiffs was procured by W. F. Wolfe & Son by means of false and fraudulent representations as to their financial standing and credit; that the mortgage was executed by such firm in pursuance of a conspiracy between the firm and the mortgage creditors, who had knowledge of the fraudulent acts of the firm, and knew that the mortgage was given with intent to hinder, delay and defraud their general creditors; that the mortgage was neither given nor accepted in good faith for the purpose of securing a *bona fide* indebtedness; but that the indebtedness was in part, if not wholly, false, fictitious and trumped up to suit the occasion, and that the real intent of Wolfe & Son in executing the mortgage was to place their property beyond the reach of their creditors.

The case was tried before a jury, and resulted in a verdict and judgment for the defendant, which was affirmed by the

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Supreme Court of the Territory (*Browning* v. *De Ford*, 8 Oklahoma, 239); whereupon plaintiffs brought the case to this court both by writ of error and appeal. Another suit in attachment brought by E. S. Jaffray & Co. against Wolfe & Son, in which the mortgage was set up as a defence and the facts were the same, also resulted in a judgment that the mortgage was fraudulent. *Jaffray* v. *Wolfe*, 4 Oklahoma, 303.

Mr. John W. Shartel for plaintiffs in error and appellants.

Mr. Arthur A. Birney for defendant in error and appellee.

Mr. Justice Brown, after making the above statement, delivered the opinion of the court.

This was a contest between mortgage creditors suing as plaintiffs and attaching creditors representing the defendant sheriff.

The facts are that on December 15, 1890, the firm of W. F. Wolfe & Son, retail merchants, and conducting a store at Oklahoma City, executed a joint chattel mortgage to one Vance and several other creditors for whom he acted, and by whom he was authorized to take any security he could get, of their stock of goods at Oklahoma City, and another stock at the city of Guthrie, not involved in this case. The mortgagees immediately took possession of the mortgaged property by one Harvey, their agent, and a brother-in-law of Vance, who proceeded to take an inventory. Shortly after the execution of the mortgage, a number of other creditors brought suits in attachment against Wolfe & Son, and through the defendant De Ford, sheriff of Oklahoma County, levied upon the goods, and dispossessed the mortgagees, who brought suits for the conversion of the property. These suits were subsequently consolidated into two cases, in one of which all the mortgage creditors appear as plaintiffs, and the sheriff of Oklahoma County as defendant. The defence was that the goods were fraudulently obtained of the attaching creditors by false representations made by W. F. Wolfe & Son as to their assets, and that

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Vance, one of the mortgage creditors, acting for himself and as agent and attorney for the others, not only had full knowledge that such goods were wrongfully and fraudulently obtained, but actively participated in obtaining the same, and that he had full knowledge that the mortgage was executed by Wolfe & Son for the purpose of hindering, delaying and defrauding their creditors, and actively participated in such fraudulent device. In other words, in brief, that the goods were purchased in the pursuance of a conspiracy that when a large stock had been obtained by Wolfe & Son by means of fraudulent statements as to their assets, certain deeds of their real estate which had been previously made, but which had remained unrecorded, should be placed of record, and the goods and merchandise obtained upon such fraudulent statements should be mortgaged to the plaintiffs in satisfaction of their claims.

In this connection the court charged the jury that, "in order to invalidate the chattel mortgage, it is not enough for the defendant to show simply that the firm of W. F. Wolfe & Son fraudulently purchased goods of the attaching creditors, but it must also appear from the evidence that the plaintiffs in this case were parties to such fraud; that they were either active participants in such fraud, or that they aided or abetted in such fraud, or that such plaintiffs at the time they took such mortgage actually knew that Wolfe & Son had fraudulently incurred a liability and debt for the goods or a portion thereof described in the chattel mortgage."

Though there are many assignments of error, there are really but two which require our consideration: First, that there was no evidence of knowledge on the part of Vance, who acted for the mortgage creditors, of the fraudulent character of the purchases made by Wolfe & Son of the attaching creditors; second, that the court erred in holding the mortgagees liable simply upon proof that the mortgage was taken with knowledge of such fraudulent representations.

1. To make out their case the attaching creditors were bound to show, first, that the goods were fraudulently purchased, and, second, that the mortgagees, or Vance, their agent, was a party to or cognizant of such frauds. There was ample evidence that

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the goods were fraudulently purchased. The firm of W. F. Wolfe & Son was composed of William F. Wolfe, the father, and Louis H. Wolfe, the son. On January 5, 1887, Louis H. Wolfe deeded to his wife Winifred, in consideration of love and affection, a certain lot of land, No. 15, in Topeka, Kansas, by deed, which was not recorded until December 17, 1890. On July 26, 1890, William F. Wolfe and his wife Georgia H. deeded to Laura V. Vance, their daughter, and the wife of A. H. Vance, another lot in the city of Topeka, No. 20, in consideration of the sum of $6500, and subject to a mortgage of $4000. This deed was also filed for record December 17, 1890. On September 8, Georgia H. Wolfe, wife of William F. Wolfe, made application to the townsite trustees of Oklahoma City for a deed to four lots of land in that city, being the site of their business house, stating that she had purchased the same on May 17, 1890, of Louis H. Wolfe, her son, and William F. Wolfe, her husband, who had given her a quitclaim deed to the same. This deed was also recorded the same day (December 17). Notwithstanding these deeds, the Wolfes, in their statement of assets furnished the attaching creditors, included all this real estate, putting an estimate of $20,000 upon that in Topeka and $12,000 upon that in Oklahoma. This amount added to the value of the Oklahoma store stock $17,000 and the Guthrie store stock $35,000, made their total assets $84,000, less $27,000 liabilities, net assets $57,000. Sundry letters were produced from the firm, written during the summer and fall of 1890 to several of the attaching creditors, in which this real estate was included as a part of their assets, notwithstanding that most of it had already been conveyed to different members of their families. These facts, which were not denied, and which were scarcely susceptible of denial, were fully established, and were clearly sufficient to lay before the jury as to the fraudulent character of the purchases of the attaching creditors.

The facts that Vance was a lawyer of long standing and considerable practice, and, as already stated, was the son-in-law of William F. Wolfe; that one of the deeds was to his wife, and was withheld from record for several months, and until a day or two after the chattel mortgage was made; that he could

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scarcely have failed to know that other deeds had been made to the wives of William F. and Louis H. Wolfe, which were also withheld from record; that these men were merchants who were constantly buying and replenishing their stock and stood in need of credit; and that he was himself one of the creditors secured by the mortgage—for a debt, too, which had been already partially paid—were, we think, sufficient evidence to open to the jury the question of his connection with the scheme of Wolfe & Son to execute this mortgage for the purpose of defrauding their unsecured creditors. The very fact that one of these deeds was withheld from record for three years and a half, another for eight months and another for about six months was, unexplained, sufficient to indicate that they were withheld for no good purpose. While evidence was lacking of a direct participation by Vance in these plans to defraud the creditors of Wolfe & Son, his intimate connection with the family and the fact that the mortgage was given, partially at least, to secure him for his liability as surety for the firm, was not too remote to justify the court in laying the whole matter of his connection with the fraudulent scheme before the jury, and as he was acting as agent and attorney for the other secured creditors, they were equally chargeable with himself.

2. Upon the second point, the jury were instructed in substance that to defeat the mortgage it was necessary for the attaching creditors to show that Wolfe & Son were guilty of fraud in contracting the debts, to satisfy which the writs of attachment were levied; and also to show that the mortgagees were parties to such fraud; or that at the time they took the mortgage they knew that Wolfe & Son had fraudulently incurred a liability for the goods described in the mortgage. The objection of the plaintiffs to this instruction is stated in their fourth assignment of error, that the court "erred in holding as a principle of law that where goods have been fraudulently obtained by means of false representations as to the financial standing of a debtor, and where such creditors elect to sue for the purchase price of such goods, and proceed by the attachment of the property claimed to belong to the debtor, that a party previously taking a mortgage on such goods to secure an

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antecedent debt, with knowledge of such false representations, must surrender such property to such attachment creditors."

The theory of the plaintiff is that the attaching creditors had an election of remedies — either to rescind the sale and replevy the goods, in which case it would have been sufficient as against the mortgagees to prove that they took the mortgage with the knowledge that the goods had been fraudulently purchased, and that the mortgagors had no title to them; or to sue for the purchase money and thereby affirm the sale, and to attach the goods as the property of the mortgagors, in which case the mortgagees would stand only as preferred creditors, and their mortgage would be valid, notwithstanding their knowledge that the goods had been fraudulently purchased.

It is entirely true that, upon being satisfied that the goods had been purchased upon fraudulent representations, the attaching creditors had an election of remedies. They might rescind the sale and replevy the goods, or they might affirm the sale, sue for the purchase price, and attach the goods upon the ground that they had been fraudulently purchased. Had it not been for the mortgage, it would only have been necessary for the attaching creditors to show that the debts were fraudulently contracted, to sustain their attachment; but in order to attack the mortgage, and to show that they had a title superior to that of the mortgage creditors, it was necessary to go further, and prove that the mortgage was fraudulent. This might be done by evidence that the mortgage was taken in pursuance of a scheme to defraud the general creditors, or that the mortgagees took their security with the knowledge that it covered goods which had been purchased upon fraudulent representations, and that the purchases were made under such circumstances as would entitle the vendors to rescind the sale and reclaim the goods. They chose, it is true, to treat the sale as valid, sue for the purchase price, and thereby affirm the title of the vendees, but they did not thereby affirm the mortgage. Their approbation went no farther than the sale from themselves to Wolfe & Son. Their reprobation went to the mortgage, and to that alone. There was, indeed, an election of remedies, and having made an election the attaching creditors

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were bound thereby. But such election went no farther than to affirm the sale, under which they were at liberty to attach the goods as still belonging to the vendees. They were bound no farther by the fraudulent mortgage of such goods than they would have been by the fraudulent assignment of them, and no class of cases is more common than that of attachments sued out for goods which are claimed to have been fraudulently assigned.

The instruction complained of is fully supported by the recent case in the Supreme Court of Kansas of *Wafer* v. *Harvey County Bank*, 46 Kansas, 597, which holds directly that an antecedent creditor, who knows that his debtor procured goods and merchandise by fraudulent means, cannot by a chattel mortgage secure a lien upon such fraudulently procured goods, adverse to the innocent vendors of such goods. This was also an action by a chattel mortgagee against the sheriff who had seized under attachments a stock of goods belonging to the attachment debtor. The distinction relied upon by the plaintiffs in this case was noticed in that, the court remarking that these goods having been obtained from the attaching creditors by fraudulent means, the debtor acquired no title to them, and the attaching creditors would be justified in retaking the goods, or they could waive the tort and bring an action for their value, in which case knowledge of the plaintiffs that the goods had been fraudulently obtained, did not put them in a position of *bona fide* purchasers or enable them to set up the mortgage against attaching creditors.

In the cases relied upon by the plaintiff, but one (*Stokes* v. *Burns*, 132 Mo. 214) is in point. In that case it was held that where defendants procured goods by fraud, and transferred the same in trust for a bank, to secure a *bona fide* indebtedness, the mere knowledge of the bank that the goods were so procured, and that the defendants intended to defraud their other creditors, is not sufficient to avoid the trust deed at the suit of a creditor, who did not seek to disaffirm the sale of property by him to defendants. The suit was by attachment for the recovery of an amount for flour sold by plaintiff to the defendants, under which the sheriff seized certain property. The grantee

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under the deed of trust filed an interplea, claiming the property so seized under his deed. The court held that the plaintiff, by suing upon his account, waived the fraud in the sale, and treated it thereby as the property of the defendants, with the same power of disposition in the defendants over it as of any other property owned by them. It was said: "If the debts secured by the deed of trust were honest debts, and the property conveyed was not excessive, and no collusive agreement shown between the defendants and the bank and Ayr Lawn Company or the trustee in the deed of trust for the use of the defendants, the deed of trust must be maintained, and there was nothing to submit to the jury. No proof was offered or claim made at the trial that any part of the property conveyed by the deed of trust was, by agreement between defendants and the beneficiaries, to be held for the use of defendants. Then proof of fraud on the part of defendants in procuring the property would have no tendency to prove such a result. If the debt secured was honest, the dishonest methods of defendants in gathering to themselves the property, and the knowledge of that fact by the beneficiaries, together with a knowledge of defendant's intention to defraud their other creditors in making the deed, all would not invalidate the deed or make availing to plaintiff the property thus conveyed in this character of suit." It was admitted in the case that the plaintiff had an election of remedies, but it was said that "the action of the plaintiff in that case was based upon a contract of sale, and was a confirmation of it and a waiver of all fraud involved in it, so far as the rights of the interpleader are concerned in the contest for the property. The sole inquiry, then, was as to the alleged fraudulent disposition of the property by the deed of trust to the interpleader, with the burden of its establishment upon the plaintiff."

We are unable to accept this view of the law. We think it makes no difference as to the rights of the mortgagee whether the action be in replevin or assumpsit. In either case the mortgagee can hold them if he be a *bona fide* purchaser, without notice, but not otherwise. If the attaching creditors rescind the sale and sue in replevin, the mortgagees, having knowledge of

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the fraudulent purchase, are in the position of taking a mortgage upon property to which they knew the mortgagor had no title. If, upon the other hand, the creditors proceed by attachment, the mortgagees, knowing that the goods were fraudulently purchased, stand in the position of taking advantage themselves of the debtor's fraud and obtaining a preference to which they are not justly entitled. If, as the evidence had some tendency to show, they actively participated in the fraud, their position is even worse.

It is consonant neither with good morals nor sound sense to hold that one may take a mortgage upon the property of another, which he knows to have been fraudulently acquired, and to which the purchaser has no valid title, whether the vendor elect to pursue the purchaser by a retaking of the property, or by an action for the price and an attachment of the property to secure the debt. Whichever remedy be pursued, the fact remains that, at the time the mortgage was taken, the mortgagor had a voidable title to the property mortgaged; and while an election to sue in assumpsit recognizes this title as between him and the vendor, such recognition does not redound to the validity of the mortgage, which must be judged of by the circumstances under which it was taken. In other words, the suit in assumpsit affirms the title of the vendee but not the title of his mortgagee.

It is at least open to doubt whether, if the mortgagees had disposed of these goods, an action might not have lain against them for their value, upon the same principle that supports an action, where the seller is induced by fraudulent representations to sell goods to an insolvent third person, from whom the misrepresenting third person afterwards obtains them. An action lies on the assumption either of a fraudulent conspiracy rendering such participant liable, or upon the ground that the nominal purchaser was only a secret agent for the misrepresenting party, who finally bought the goods. *Biddle* v. *Levy*, 1 Stark. 20; *Hill* v. *Perrott*, 3 Taunt. 274; *Phelan* v. *Crosby*, 2 Gill. 462; *State* v. *Schulein*, 45 Missouri, 521; 2 Schouler's Pers. Prop. sec. 612; Benj. on Sales, 4th ed. sec. 445.

The other cases cited by the plaintiffs are not in point. In

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Statement of the Case.

O'Donald v. *Constant*, 82 Indiana, 212, the evidence showed that the debtor who purchased the goods fraudulently turned them over to certain preferred creditors who had no knowledge of the fraudulent purchases. The case of *Bach* v. *Tuch*, 126 N. Y. 53, merely holds that a suit for the price brought with knowledge of the fraud was a ratification of the sale, and estopped the vendor from rescinding it and suing in replevin. The cases of the *First National Bank* v. *McKinney*, 47 Nebraska, 149, and *Thomason* v. *Lewis*, 103 Alabama, 426, are to the same effect.

Upon the whole, we see no error in the judgment of the Supreme Court, and it is therefore

Affirmed.

MORAN v. HORSKY.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 177. Argued and submitted March 12, 1900.—Decided May 21, 1900.

A neglected right, if neglected too long, must be treated as an abandoned right, which no court will enforce.

Whenever the invalidity of a land patent does not appear upon the face of the instrument, or by matters of which the courts will take judicial notice, and the land is apparently within the jurisdiction of the land department as ordinary public land of the United States, then it would seem to be technically more accurate to say that the patent was voidable, not void.

The defence of laches, put in in this case, is the assertion of an independent defence, proceeding upon the concession that there was, under the laws of the United States a prior right, and conceding that, says that the delay in respect to its assertion prevents its present recognition; and the court is of opinion that the decision of the Supreme Court of Montana in this case was based upon an independent non-Federal question, broad enough to sustain its judgment.

THE facts in this case are as follows: On June 15, 1872, a patent was issued to the probate judge of Lewis and Clarke County, Montana Territory, for the townsite of Helena, in trust

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for the benefit of the occupants. In 1874 Joseph Horsky, Jr., the plaintiff below, defendant in error, became by purchases from prior occupants and conveyances from the probate judge the holder of the legal title to certain lots, shown on the plat of the town. He entered into occupation at the date of his purchase, and has been in undisturbed and peaceful possession from that time to the present. Among these lots are two known and described as lots Nos. 19 and 20, in block 37, on the original plat of the townsite. Subsequent surveys disclosed that, measured by the description on the plat and the calls of the deed, there was an extra area of ground 22 feet front by 103 feet deep. When that fact was discovered the grantor of the plaintiff applied to the probate judge for a conveyance of this extra ground, and paid him the requisite price therefor. However, he received no deed at that time, apparently supposing the deeds for lots 19 and 20 would carry the ground; but afterwards, and on December 15, 1888, on application of the plaintiff, and upon the basis of the prior application and the payment of the necessary price, the probate judge made a deed to him of that extra area known and described on a subsequent plat as lot 31, block 37. In 1891 he filed his complaint in the District Court of the First Judicial District of the State of Montana, setting forth these facts, and that the defendant, Patrick Moran, had, on December 11, 1888, obtained from the probate judge a deed for this lot 31, alleging that it was wrongfully obtained, and praying for a decree quieting his title.

The case thus presented was litigated in the state courts for two or three years, passed to the Supreme Court of the State, (13 Mont. 250,) where a decree in favor of the plaintiff was reversed, and finally came on for hearing in the District Court upon the bill of plaintiff, setting forth the facts, as above stated, and an amended answer of the defendant, containing these averments: That on the 2d day of March, 1869, the probate judge of Lewis and Clarke County made an entry of the tract of land for the benefit of the occupants of the townsite of Helena; that prior to the entry of said townsite a certain placer mining claim had been located within the exterior limits of the tract so entered, which included within its boundaries the lot in contro-

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versy; that the location had been made pursuant to the laws of the United States, the local laws, and the rules and regulations of the mining district, and all had been done required thereby to make a perfectly valid location of said placer mining claim, and that the title to this mining claim thus located passed to the defendant; that it was a valid and subsisting mining claim at the time of the entry of the land by the probate judge and of the patent to him; that after the entry of the townsite, and prior to 1874, the defendant left the State of Montana, leaving the mining claim in possession of an agent; that during his absence the plaintiff obtained his deeds for the premises referred to, and entered into possession; that when the defendant returned to Montana he found the plaintiff in possession; that he had ever since been, by the action of the plaintiff, prevented from entering upon or working such mining claim; and that in December, 1888, finding that no deed had ever been made to the plaintiff for this portion of the property, he obtained in furtherance and protection of his own title a deed from the probate judge, which was the deed referred to in plaintiff's complaint.

Upon these pleadings a decree was entered by the District Court in favor of the plaintiff, quieting his title to the premises. On appeal to the Supreme Court of the State this decree was affirmed, (21 Mont. 345,) whereupon the case was brought on error to this court.

Mr. Thomas J. Walsh for plaintiff in error. *Mr. Rufus C. Garland* was on his brief.

Mr. Edwin W. Toole for defendant in error submitted on his brief.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The Supreme Court of the State affirmed the decree of the trial court primarily on the ground of laches. If this be an independent ground, involving no question under the Federal

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statutes, the decision of the Supreme Court must be sustained and the writ of error dismissed. *Eustis* v. *Bolles*, 150 U. S. 361.

Indeed, if the matter of laches can be recognized at all, it is difficult, independently of the question of jurisdiction, to perceive any error in the ruling of the state Supreme Court. One who, having an inchoate right to property, abandons it for fourteen years, permits others to acquire apparent title, and deal with it as theirs, and as though he had no right, does not appeal to the favorable consideration of a court of equity. We need only refer to the many cases decided in this court and elsewhere, that a neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce. See among others *Felix* v. *Patrick*, 145 U. S. 317; *Galliher* v. *Cadwell*, 145 U. S. 368, and cases cited in the opinion. There always comes a time when the best of rights will, by reason of neglect, pass beyond the protecting reach of the hands of equity, and the present case fully illustrates that proposition.

We, therefore, pass to an inquiry whether the question of laches is so intermingled with that of Federal right that the former cannot be considered an independent matter. As this case was disposed of upon bill and answer, we must take the facts to be as they are presented by the pleadings.

At the time of the commencement of the several proceedings referred to in the bill and answer, the entire area of ground compassed within the limits of the townsite of Helena was public land of the United States, subject to be taken under the preemption, homestead, townsite or mineral laws. There was no reservation in behalf of any railroad company, or for military or other purposes. The whole tract was subject to private appropriation. Under those circumstances, the probate judge of the county made an application for an entry of the tract, as a whole, as a townsite. His application was entertained, the entry made, and thereafter a patent issued to him for the entire tract, including the premises in controversy. Apparently, therefore, by the terms of the patent the legal title to this land had passed to the probate judge in trust for the several occupants. But we are referred by counsel to *Deffeback* v. *Hawke*, 115 U. S. 392, 393, in which it was held that a patent under

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the townsite act is "inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation and improvement for residences or business under the townsite title;" and this by virtue of the express provisions of the law relating to the disposition of lands for townsites, as follows: "No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws." Rev. Stat. § 2392.

The ruling in this case was qualified in *Davis's Administrator* v. *Weibold*, 139 U. S. 507, and it was held that the title of a lot owner holding a deed from the probate judge who had entered the lands under the townsite act could not be defeated because after the issue of the patent there was a discovery of minerals and an issue of a patent therefor to the discoverer, the court saying, on p. 524, after referring to some decisions of the land department:

"It would seem from this uniform construction of that department of the government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining States, Federal and state, whose attention has been called to the subject, that the exception of mineral lands from grants in the acts of Congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction."

The allegations of the answer are to the effect that there was a known mining claim, actually located and worked, at the time of the entry and patent of the townsite, and the argument is that the mining claim was excepted from the scope of the townsite patent as completely as though the exception had been in terms named on the face of the instrument and the boundaries claimed described. The probate judge, therefore, never took title, and having none conveyed none to the plaintiff; the title remained in the government, and neither laches nor limitation run against the rights and title of the government. The mining claim existed, and although defendant had

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abandoned it for years, yet as no one had taken steps to relocate it, he had the right to resume possession and continue work in the way of perfecting his title.

In an opinion by a judge of the state District Court, delivered in deciding this case, is an interesting discussion of the difference between a void and voidable patent, and many authorities from this court are quoted. We shall not attempt to refer to all of them, but content ourselves with noticing one or two. In *United States* v. *Schurz*, 102 U. S. 378, it was held that mandamus would lie to compel the delivery of a land patent which had been duly signed, sealed, countersigned and recorded; that by those acts the title had passed to the patentee, and nothing remained but the ministerial duty of delivering the instrument. In that case there was a matter of dispute between the patentee, who had made a homestead entry, and other parties who claimed that the land was within the incorporated limits of the town of Grantsville, and that the entry had been wrongfully sustained. In the course of a very careful opinion by Mr. Justice Miller, it was said (pp. 400, 401):

"It is argued with much plausibility that the relator was not entitled to the land by the laws of the United States, because it was not subject to homestead entry, and that the patent is, therefore, void, and the law will not require the Secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land.

"We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

"But the distinction between a void and a voidable instrument, though sometimes a very nice one, is still a well recognized distinction on which valuable rights often depend. And the case before us is one to which we think it is clearly applicable. To the officers of the land department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that district generally had been opened to preëmption, homestead entry and

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sale. The question whether any particular tract, belonging to the government, was open to sale, preëmption or homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character.

"It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. When their decision of such a question is finally made and recorded in the shape of the patent, how can it be said that the instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts, where the government never had any, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the land department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void."

Now, as we have heretofore noticed, the patent in the case before us for the townsite purported to convey the entire tract. On the face of the instrument there was nothing to suggest any exception. While it may be conceded, under the authorities which are referred to, that, in an action at law by a claimant under that patent, the existence of a mining claim at the time of its issue might be shown and be a valid defence to a recovery of so much of the ground as was included within the mining

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claim, and in that view it may perhaps be not inaptly said that the patent was to that extent void. But be this as it may, whenever the invalidity of a patent does not appear upon the face of the instrument, or by matters of which the courts will take judicial notice, and the land is apparently within the jurisdiction of the land department as ordinary public land of the United States, then it would seem to be technically more accurate to say that the patent was voidable and not void. Even in cases where it has been called void the right of the United States to maintain a bill to set aside the patent has been sustained. Thus, in *United States* v. *Stone*, 2 Wall. 525, patents had been issued for certain lands, (which were in fact within the limits of Fort Leavenworth Military Reservation,) and a bill in equity was filed by the United States to set them aside. Mr. Justice Grier, delivering the opinion of the court, sustaining the decree of the Circuit Court in favor of the government, uses this language (pp. 535, 537):

"Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.

"It is contended here, by the counsel for the United States, that the land for which a patent was granted to the appellant was reserved from sale for the use of the government, and, consequently, that the patent is void. And although no fraud is charged in the bill, we have no doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, that the decree of the court below cancelling the patent should be affirmed.

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"We are of opinion, therefore —

"1. That the land claimed by appellant never was within the tract allotted to the Delaware Indians in 1829 and surveyed in 1830.

"2. That it is within the limits of a reservation legally made by the President for military purposes.

"Consequently, the patents issued to the appellants were without authority and void."

Suppose the United States had brought a bill to set aside so much of this townsite patent as included the mining claim referred to, as, under the authority last referred to and many others, it might have done, it would, under the circumstances disclosed, have been a suit in the interest of and for the benefit of the defendant, and in order to enable him to perfect his inchoate title to this mining property. But it is well settled that when the government proceeds to set aside its patent, not for the sake of establishing its own right to the property, but in the interest of some person who has an equitable claim thereto, or to whom the government owes the duty of protecting his interests, it is subjected to the same defences of laches, limitation and want of equity that would attach to a like suit by an individual. *United States* v. *Beebe*, 127 U. S. 338, in which it was said by Mr. Justice Lamar, on page 347:

"When the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party, nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants.

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"These principles, so far as they relate to general statutes of limitation, the laches of a party and the lapse of time, have been rendered familiar to the legal mind by the oft-repeated enunciation and enforcement of them in the decisions of this court. According to these decisions, courts of equity in general recognize and give effect to the statute of limitations as a defence to an equitable right, when at law it would have been properly pleaded as a bar to a legal right."

See also *United States* v. *Des Moines Navigation & Railway Company*, 142 U. S. 510; *Curtner* v. *United States*, 149 U. S. 662.

Now, if the government, seeking, in order to discharge its duty to the defendant, to avoid so much of the patent as included this mining claim, is bound by the ordinary rules of equity in respect to laches, etc., *a fortiori* is it true that when he is the party to the litigation the same equitable rules are binding on him. The government cannot, when acting for him, avail itself of those principles of law which are designed simply for its own protection, and no more can he, in his own litigation, shelter himself behind those principles. It is a private right which he is relying upon, although a right created under the laws of the United States, and as to this private right he is subjected to the ordinary rules in respect to the enforcement and protection of such a right.

Carothers v. *Mayer*, 164 U. S. 325, is worthy of notice, for in that case, although not under precisely similar circumstances, it was held that a question arising under the statute of limitations as against a title asserted under the Federal law presented no Federal question, and so also as to equitable rights asserted as against an original right under the laws of Congress. See also *The Pittsburgh & Lake Angeline Iron Co.* v. *The Cleveland Iron Mining Company et al.*, *post*, 270.

Neither does this case in any of its aspects come within *Gibson* v. *Chouteau*, 13 Wall. 92. In that case it was held that one who acquired a legal title from the government could not be defeated in respect to that title on the ground that the party in possession had while the title was in the government acquired some equitable rights by possession or otherwise, which might

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have been enforced against one who, during all the time, had as an individual held the legal title. In other words, that as no equitable rights could be asserted against the government while it held the legal title, so when it passed the legal title to an individual he acquired all the rights which the government had at the time of the passage of such legal title. So far as that case has any bearing upon this, it tends to support the conclusions of the Supreme Court of the State of Montana, because here at least the apparent legal title passed to the probate judge, and thereafter to the plaintiff, and it was only an equitable and inchoate right which the defendant was trying to assert.

We conclude, therefore, that the defence of laches, which in its nature is a defence conceding the existence of an earlier legal or equitable right, and affirming that the delay in enforcing it is sufficient to deny relief, is the assertion of an independent defence. It proceeds upon the concession that there was under the laws of the United States a prior right, and, conceding that, says that the delay in respect to its assertion prevents its present recognition. For these reasons we are of the opinion that the decision of the Supreme Court of Montana was based upon an independent non-Federal question, one broad enough to sustain its judgment, and the writ of error is

Dismissed.

TARPEY *v.* MADSEN.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 119. Argued January 25, 26, 1900.—Decided May 21, 1900.

The right of one who has actually occupied public land, with an intent to make a homestead or preëmption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent.

The law deals tenderly with one who, in good faith, goes upon public lands, with a view of making a home thereon.

When the original entryman abandons the tract entered by him, and it comes within the limits of a grant to a railroad company, a third party,

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Statement of the Case.

coming in after the lapse of many years, and setting up the title of that entryman, does not come in the attitude of an equitable appellant.

A proper interpretation of the acts of Congress making railroad grants like the one in this case requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company, in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other, the declaration or entry in the local land office; and while, as repeatedly held, the railroad company may not question the validity or propriety of the entryman's claim of record, its rights ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation.

THIS case comes on error to the Supreme Court of the State of Utah, and involves the title to the S.W. ¼ of section 29, township 11 north, of range 2 west. This tract is within the place limits of the grant to the Central Pacific Railroad of California. The map of definite location of that part of the road opposite this land was filed, and approved by the Secretary of the Interior, on October 20, 1868, and the entire road was constructed and accepted prior to 1870. The land is not mineral nor swamp land, nor was it returned or denominated as such; was agricultural in character; and at the date of the filing of the map of definite location there was nowhere any record evidence of a private claim. At that time no local land office had been established in the district in which this land is situated. Such office was opened some time in April or May, 1869. On May 29, 1869, this declaratory statement was filed:

"*Declaratory statement for cases where the lands are not subject to private entry.*

"I, Moroni Olney, of Box Elder County, Utah Territory, being a citizen of the United States and the head of a family, have on the 23d day of April, 1869, settled and improved the S.W. ¼ of section 29, township 11 north, of range 2 west, in the district of lands subject to sale, at the land office in Salt Lake City, Utah, and containing 160 acres, which land has not yet been offered at public sale, and thus rendered subject to private entry, and I do hereby declare my intention to claim said

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tract of land as a preëmption right under the provisions of said act of 4th September, 1841.

"Given under my hand this 29th day of May, 1869.

(Signed) "MORONI OLNEY.

"In the presence of—

"ABRAHAM HUNSAKER."

Nothing further was done by Olney. He abandoned the land, and nothing appears to have been heard of him since the date of the entry. On June 20, 1896, Andrew Madsen, the defendant in error, who alleged that he had been a settler and in occupation of the tract since 1888, filed a homestead entry thereof in the local office. A contest had previously and in 1893 been instituted between the railroad company and Madsen, which was heard and decided by the register and receiver, whose decision was affirmed by the Commissioner of the General Land Office, the finding of the register and receiver, as appears from the record in this case, being—

"We find that the tract in question, which is the S.W. ¼ of section 29, township 11 north, of range 2 west, of the Salt Lake meridian, was settled upon and occupied and claimed by a qualified entryman, to wit, Moroni Olney, prior to October 20, 1868, which therefore excepted the land from the operation of the grant of Congress to the Central Pacific Railroad Company."

A certified copy of that decision in full was filed by counsel for defendant in error on the hearing in this court, and that certified copy reads as follows:

"This case arises upon an application to enter a tract of land covered by a railway selection, which it is sought to cancel, for the reason that a valid settlement had been made on the land prior to the date of the attachment of the grant to the railway company.

"Our decision is that the motion of the Central Pacific Railway Company to strike out, dismiss and expunge the depositions from the records should be denied. We therefore find the issues in favor of Andrew Madsen, and that the tract of land in dispute was reserved and excepted from the grant to the railroad company, because, first, a preëmption claim had attached

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to the land in dispute at the time the line of said road was definitely fixed.

"2d. There was a qualified preëmption claimant upon the land at that time, which brought it within the first portion of the excepting clause of the act of 1864, which provides that any lands granted by that act, or the act to which it is an amendment, shall not defeat or impair any preëmption claim.

"3d. On the 20th day of October, 1868, the land in dispute contained the improvements of a *bona fide* settler, which also excepted the land from the provisions of the grant.

"We further find that Central Pacific Railway selection No. 3 should be cancelled as to the tract in dispute, and that Andrew Madsen should be permitted, if he so desires, to make preëmption entry covering this land.

"We decide that he should be permitted to enter the land under the preëmption law, because his right to do so—*i. e.*, his settlement upon the land—was initiated long prior to the act of March 3, 1891, repealing the preëmption law, which repealing act expressly excepted all *bona fide* claims lawfully initiated before the passage of the act."

After the decision of the Commissioner affirming that of the register and receiver, the entry was made and a patent was issued to Madsen.

Prior thereto and on January 12, 1894, this action was brought in the fourth judicial district of the Territory of Utah, county of Box Elder, by the plaintiff in error, grantee from the railroad company, to establish his title to the tract and to recover possession. In the trial court, after the issue of the patent and the admission of Utah as a State, a decree was entered in favor of the defendant. The case was taken by appeal to the Supreme Court of the State, and by that court the decree of the district court was affirmed, 17 Utah, 352, to review which decree this writ of error was brought.

Mr. L. E. Payson for plaintiff in error. *Mr. L. R. Rogers* filed a brief for same.

Mr. B. Howell Jones for defendant in error.

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Opinion of the Court.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

A narrow but important question is presented by this record. The land in controversy is an odd numbered section within the place limits of the grant to the Central Pacific Railroad Company. The identification of the lands which passed by that grant was made at the time the map of definite location was filed in the office of the Secretary of the Interior, and by him approved, to wit, October 20, 1868, and the question is whether there was anything in the occupation or entry by Olney to defeat the title apparently then passing to the railroad company. That there was nothing of record affecting the validity of that title is conceded. No one, by an investigation of any public record, could have ascertained at that time that there was any doubt in respect thereto.

It is true that there was then no local land office in which those seeking to make preëmption or homestead entries could file their declaratory statements or make entries, and the want of such an office is made by the Supreme Court of the State one of the main grounds for holding that the land did not pass to the railroad company. We agree with that court fully in its discussion of the general principles involved in the failure of the Government to provide a local land office. The right of one who has actually occupied, with an intent to make a homestead or preëmption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent. In many States the statutory provision in respect to suits is that the defendant, on receiving service of summons, must within a certain time file his answer in the office of the clerk of the court. It cannot be doubted that if, before he is thus called upon to file his answer the office is burned, and the clerk dies, and there is no place or individual at which or with whom his answer can be filed, such accident or omission will not defeat his right to make a defence, or give to the plaintiff a right to take judgment by default. Where the accident or omission is not the fault of the party but of the Government, or some official of the government, such accident or omission cannot defeat

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the right of the individual, and in all that is said in respect to this by the Supreme Court of the State of Utah we fully agree. If Olney was in possession of this tract before October 20, 1868, with a view of entering it as a homestead or preëmption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights. But when the office was opened he filed his declaratory statement, and in that he did not suggest that he had been in the occupation of the premises prior to October 20, 1868, but declared that on the 23d of April, 1869, he settled and improved the tract. Assume that such declaration was subject to correction by him, that he could thereafter have corrected the mistake (if it was a mistake) and shown that he occupied the premises prior to October 20, 1868, with an intent to enter them as a homestead or preëmption claim, he never did make the correction, and there is nothing in the record to show that his occupation prior to April 23, 1869, was with any intent to acquire title from the United States.

And in this respect we must notice the oft-repeated declaration of this court, that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon." *Ard* v. *Brandon*, 156 U. S. 537, 543; *Northern Pacific Railroad* v. *Amacker*, 175 U. S. 564, 567. With this declaration, in all its fulness, we heartily concur, and have no desire to limit it in any respect, and if Olney, the original entryman, was pressing his claims every intendment should be in his favor in order to perfect the title which he was seeking to acquire. But when the original entryman, either because he does not care to perfect his claim to the land or because he is conscious that it is invalid, abandons it, and a score of years thereafter some third party comes in and attempts to dispossess the railroad company (grantee of Congress) of its title—apparently perfect and unquestioned during these many years—he does not come in the attitude of an equitable appellant to the consideration of the court.

It must be remembered that mere occupation of the public

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lands gives no right as against the government. It is a matter of common knowledge that many go on to the public domain, build cabins and establish themselves, temporarily at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and enclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory rights are recognized as of value and made the subjects of barter and sale. *Lamb* v. *Davenport*, 18 Wall. 307. In that case it appeared that certain individuals settled on what is now the city of Portland, Oregon, and laying off a townsite distributed among themselves the lots. Thereafter they bought and sold those lots as things of value, and although such settlement was antecedent to any act of Congress authorizing it, their contracts in respect to the lots were sustained, the court, speaking by Mr. Justice Miller, saying (p. 314):

"And though these rights or claims rested on no statute, or any positive promise, the general recognition of them in the end by the Government, and its disposition to protect the meritorious actual settlers, who were the pioneers of emigration in the new territories, gave a decided and well understood value to these claims. They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid."

But notwithstanding this recognition of the rights of individual occupants as against all other individuals, it has been uniformly held that no rights are thus acquired as against the United States. In *Camfield* v. *United States*, 167 U. S. 518, this court sustained a bill filed by the United States to compel by mandatory injunction certain parties to vacate public lands which they were occupying without any intent to purchase, and whose occupancy therefore stood in the way of others who might wish to enter and acquire title under the land laws of the United States. See also *Frisbie* v. *Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77.

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It is undoubtedly true that one occupying land with a view of preëmption is given thirty days within which to file with the register of the land office his declaratory statement, Rev. Stat. § 2264 and since 1880 the same right has been possessed by one desiring to make a homestead entry. Act of May 14, 1880, 21 Stat. c. 89, sec. 3. So that any controversy between two occupants of a tract open to preëmption and homestead entry is not determined by the mere time of the filing of the respective claims in the land office, but by the fact of prior occupancy, and these controversies are of frequent cognizance. Oral evidence, therefore, of the date of occupancy may be decisive of the controversy between such individual applicants for a tract of public land, but by decisions of this court, running back to 1882, as between a railroad company holding a land grant and an individual entryman the question of right has been declared to rest not on the mere matter of occupancy, but upon the state of the record. All the cases in this court, in which this question has been discussed and the conclusion announced, have been since the act of 1880, giving to persons seeking a homestead the same rights in respect to occupancy as to persons intending a preëmption.

The original Union Pacific Railroad act (12 Stat. 492, sec. 3) excepted from the grant of the odd sections to the railroad company all those tracts to which an adverse right had attached "at the time the line of said road is definitely fixed." The act does not in terms prescribe how or by what evidence it shall be determined that the line of said road has become definitely fixed, and for many years after its passage, interpreting this and other like railroad land grants, the ruling of the land department was that the line was definitely fixed whenever it was surveyed, staked out and marked on the face of the earth, *United States* v. *Winona &c. Railroad*, 165 U. S. 463, 473, and that if at that time there was no adverse right the title of the railroad company was settled. Of course, this left such date one to be determined by oral testimony, and so as to each individual odd-numbered tract within the place limits of the grant the question of title was determined by evidence of the time of surveying, staking and marking on the face of the earth the line of

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the railroad, and corresponding evidence of occupancy by an individual with a view to entry under the general land laws. No title, therefore, certainly passed to the railroad company until a patent had been issued to it; and, indeed, under the settled ruling that land which was held by a prior claim did not pass to the railroad company under its grant, it was doubtful whether even then it had received a title beyond challenge. This unfortunate uncertainty and instability of title continued until the decisions of this court in *Van Wyck* v. *Knevals*, 106 U. S. 360, and *Kansas Pacific Railway Company* v. *Dunmeyer*, 113 U. S. 629, the first decided in October, 1882, and the latter in March, 1885. By those cases it was settled that the time at which the title of the railroad company passed beyond question was that of the filing of an approved map of definite location in the office of the Secretary of the Interior. This eliminated all oral testimony, and established a date at which, by record, the title of the railroad company could be considered as definitely ascertained. In the latter of the two cases, *Kansas Pacific Railway Company* v. *Dunmeyer*, the same elimination of oral testimony, the same reference to the record as determining all opposing rights of the individual entryman, was also declared. That was a case of a homestead entry, but as five years prior thereto homestead and preëmption entries had been placed in the same category as far as respects the right of preliminary occupation, it is not strange that the court in that opinion spoke generally of preëmption and homestead entries.

After referring to the rule in reference to the filing of the map of definite location in the office of the Secretary of the Interior, Mr. Justice Miller, announcing the conclusions of the court, said (p. 640):

"This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved or otherwise disposed of by the United States, and to which a preëmption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved,

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or a homestead or preëmption claim had attached to any of them."

And again (p. 641):

"It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. . . . The reasonable purpose of the government undoubtedly is that which it expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a preëmption or homestead right to attach. No right to such land passes by this grant."

And finally (p. 644):

"Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

The doctrine thus announced, that rights on either side as between the railroad company and the entrymen are determined by the facts appearing of record, has been repeatedly recognized since. In *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357, these rights were discussed by Mr. Justice Lamar, who, by reason of his experience as Secretary of the Interior, was preeminently qualified to speak in reference thereto. And an entry which was clearly open to challenge by the government was held to be effective to withdraw the land from the operation of the railroad grant. On page 361 Mr. Justice Lamar observed:

"In the light of these decisions the almost uniform practice of the department has been to regard land, upon which an entry of record valid upon its face has been made, as appropriated

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and withdrawn from subsequent homestead entry, preëmption settlement, sale or grant until the original entry be cancelled or declared forfeited; in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws."

And then, after referring to the contention that the *Dunmeyer* case was not conclusive because in that case the entry was valid on its face, while this was defective, he added (p. 364):

"But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants. In the case before us, at the time of the location of the company's road, an examination of the tract books and the plat filed in the office of the register and receiver, or in the land office, would have disclosed Turner's entry as an entry of record, accepted by the proper officers in the proper office, together with the application and necessary money, an entry the imperfections and defects of which could have been cured by a supplemental affidavit or by other proof of the requisite qualifications of the applicant. Such an entry attached to the land a right which the road cannot dispute for any supposed failure of the entryman to comply with all the provisions of the law under which he made his claim. A practice of allowing such contests would be fraught with the gravest dangers to actual settlers, and would be subversive of the principles upon which the munificent railroad grants are based."

Still later, in *Whitney* v. *Taylor*, 158 U. S. 85, in which the validity of a preëmption entry was challenged as against a railroad grant, we said (p. 94):

"But it is also true that settlement alone, without a declaratory statement, creates no preëmption right. 'Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preëmptor, the rule being that his settlement alone is not sufficient for that purpose.' *Lansdale* v. *Daniels*, 100 U. S. 113, 116. And the acceptance

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of such declaratory statement, and noting the same on the books of the local land office, is the official recognition of the preemption claim. While the cases of *Kansas Pacific Railway Co.* v. *Dunmeyer*, and *Hastings & Dakota Railway Co.* v. *Whitney*, *supra*, involved simply homestead claims, yet, in the opinion in each, preëmption and homestead claims were mentioned and considered as standing in this respect upon the same footing."

And in *Northern Pacific Railroad Company* v. *Colburn*, 164 U. S. 383, we held distinctly that no mere occupation of a tract of public land in and of itself excepted that tract from the operation of a railroad grant; that a settler could not dispute the claim of a railroad company until and unless he had filed his entry in the proper land office. Still later, in *Northern Pacific Railroad* v. *Sanders*, 166 U. S. 620, 630, we said:

"Any other interpretation would defeat the evident purpose of Congress in excepting from railroad grants lands upon which claims existed of record at the time the road to be aided was definitely located. What that purpose was has been frequently adverted to by this court."

And subsequently, on page 631, we quoted, as the settled law in this respect, from *Kansas Pacific* v. *Dunmeyer* the first of the quotations therefrom heretofore given in this opinion.

If it be said that this rule ignores the privileges given to temporary occupants of land to make entry within a short time it must be said that it also denies the personal right of the railroad company to fix definitely its line of road. For when the company has by resolution of its directors established such line, and that has been marked on the ground by posts and stakes, it has done all required by the letter of the statute. If it be said that the railroad company may, notwithstanding its personal action thereafter, vote to locate its road on a different line, so on the other hand may it be said that the individual occupant of a tract may abandon his thought of entry; and by making each of the parties' rights, to wit, those of the railroad company and the individual, turn on a matter of record, the court simply gave definiteness and certainty to the congressional grant. It was said in *Missouri, Kansas & Texas Rail-*

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way v. *Kansas Pacific Railway*, 97 U. S. 491, 497, repeated in *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 598: "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties." And surely Congress in making a grant to a railroad company intended that it should be of present force, and of force with reasonable certainty. It meant a substantial present donation of something which the railroad company could at once use, and use with knowledge of that which it had received. It cannot be supposed that Congress contemplated that, as in this case, a score of years after the line of definite location had been fixed and made a matter of record, some one should take possession of a tract apparently granted, and defeat the company's record title by oral testimony, that at the time of the filing of the map of definite location there was an actual though departed occupant of the tract, and therefore that the title to it never passed. The conditions are very different from those which exist between two individual occupants and claimants of a particular tract, for each is there in possession to watch and know the action of the other, and the question of right is subject to immediate and certain determination. In the present case, on the other hand, years after the title of the railroad company had apparently vested, this defendant comes in and says that this tract was excluded from the grant because somebody was in occupation, and if this can be said at the end of twenty years equally well can it be said at the end of half a century. So it is that interpreting the act making the grant as a law as well as a grant, and recognizing that Congress must have intended a present donation with reasonable certainty of identification, this court properly held that the records made in the office of the Secretary of the Interior and in the local land offices should be conclusive as between the company and the individual entryman. And if the ruling at times may oper-

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ate against an individual entryman it does so more frequently against the railroad company in preventing it from claiming rights existing at the time that it in fact definitely locates its line of road.

It will be noticed that the third finding of the register and receiver states that on the 20th day of October the land in dispute contained "the improvements of a *bona fide* settler," which, as they held, also excepted the tract from the grant. This matter is also referred to in the opinion of the Supreme Court of Utah. But the exception in the amendatory act of 1864, 13 Stat. 358, of "the improvements of any *bona fide* settler," so far from sustaining the conclusion of the local officers, makes against it, for specifically exempting improvements contemplates cases in which the settler shall have a right to remove his improvements, although he may not have a right to perfect his title to the land. The exception is not of land on which are improvements of a *bona fide* settler but simply the improvements of a *bona fide* settler, thus distinguishing between a right to the land and a right to be protected in respect to the improvements.

Recapitulating, we are of opinion that a proper interpretation of the acts of Congress making railroad grants like the one in question requires that the relative rights of the company and an individual entryman, must be determined, not by the act of the company in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other the declaration or entry in the local land office. In this way matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite; and while, as repeatedly held, the railroad company may not question the validity or propriety of the entryman's claim of record, its rights ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation; for if that be the rule, as admitted by counsel for defendant in error on the argument, the time will never come at which

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it can be certain that the railroad company has acquired an indefeasible title to any tract.

For these reasons, we are of the opinion that the judgment of the Supreme Court of the State of Utah is erroneous, and it must be reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

THE CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissented.

McDONNELL *v.* JORDAN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 253. Argued April 19, 20, 1900.—Decided May 21, 1900.

The decision in *Fisk* v. *Henarie*, 142 U. S. 459, that the words in the act of March 3, 1887, 24 Stat. 552, with regard to the removal of causes from a state court, (as corrected by the act of August 13, 1888, c. 866,) "at any time before the trial thereof," used in regard to removals "from prejudice or local influence," were used by Congress with reference to the construction put by this court on similar language in the act of March 3, 1875, c. 137, 18 Stat. 470, and are to receive the same construction, which required the petition to be filed before or at the term at which the cause could first be tried, and before the trial thereof.

MATTIE Lee Fennell, a citizen of the county of Madison, State of Alabama, died on the fifth day of August, 1897, leaving a will executed by her December 17, 1895, in which she devised and bequeathed all her property, real, personal or mixed, to her mother, Mrs. M. E. Fennell, for life, and on her death to Llewellyn Jordan of the State of Mississippi. The will specifically provided that if the mother should die before the death of the testatrix, Llewellyn Jordan should take. Said Llewellyn Jordan and Walter E. Jordan, a citizen of Madison County, Alabama, were nominated and appointed executors of the will,

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to act as such without bond. The mother died in 1896. February 9, 1897, Walter E. Jordan, one of the executors named, presented his petition to the Probate Court of Madison County, Alabama, together with the original will, to have said will admitted to probate. The petition stated that the sister of testatrix, Ada F. McDonnell, resident of Madison County, was her next of kin, and would have been her only heir had she died intestate; that Llewellyn Jordan was temporarily residing at Washington, D. C.; that the attesting witnesses resided at Huntsville, Alabama; and prayed that a date might be set for the hearing of the petition and due notice thereof be given as required by law to the next of kin of said deceased, and that such decrees, orders and other proceedings might be had and made in the premises as might be necessary to effect the due probate of said will according to law.

On the 11th day of February, 1897, Ada F. McDonnell, a sister, and only heir at law, of Mattie Lee Fennell, filed in the Probate Court her written contest of the alleged will, based on certain grounds therein set forth, and demanded a trial by jury. April 1, 1897, a jury was empanelled to try the contest, and an issue was then made up by the court between Walter E. Jordan, as plaintiff, and Ada F. McDonnell, as defendant, and the trial entered upon. On April 15, 1897, after having considered the case, the jury came into court and reported that they were unable to agree upon a verdict, whereupon the jury were discharged, and the case was continued.

May 28, 1897, Walter E. Jordan applied to the Probate Court to amend his petition by alleging: "That the said Llewellyn Jordan is the sole legatee and devisee under said will, and is the person really interested in defending the validity of said will and in answering and defending the contest filed in said court to annul and make invalid said will;" and to add to the prayer of his petition the following: "Petitioner prays that citation and all proper notice be given the said Llewellyn Jordan of this case and contest, and that he be made a party defendant to this petition."

The following order was entered thereon by the Probate Court, August 3, 1897: "In the matter of the petition of W. E.

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Jordan to make Llewellyn Jordan party defendant to this case, and that citation and all proper notice be given said Llewellyn Jordan as such, heretofore filed with the papers in this case, May 28th, 1897, was set for hearing this August 3rd, 1897. This day argued by Shelby and Walker for proponent and Richardson and Cooper for contestant. Motion overruled and amendment not allowed, and for reason good and satisfactory to this court the further hearing of this contest continued to Sept. 3rd, 1897."

On the 4th of August, Llewellyn Jordan, without leave, filed with the clerk of the Probate Court a paper styled an "answer," which commenced as follows: "In the matter of the contest of the probate of the will of Mattie Lee Fennell comes Llewellyn Jordan, named in the amendment to the petition in this cause filed by Walter E. Jordan, and intervenes in said proceeding and files this his answer to the contest of Ada F. McDonnell;" and on that day the Probate Court entered the following order: "In this cause a paper, purporting to be an intervention on behalf of Llewellyn Jordan, having been indorsed 'filed' by the clerk of this court, without the knowledge of the court, and said paper being so indorsed filed without an order authorizing said Llewellyn Jordan to intervene herein, and the motion made by Walter E. Jordan, the proponent, praying that said Llewellyn Jordan be made a party defendant hereto, on the 3rd day of August, 1897, being overruled and disallowed, it is therefore ordered that said paper purporting to be an intervention of said Llewellyn Jordan be stricken from the files in this cause."

August 5, 1897, Walter E. Jordan, the proponent of the will, filed in the Probate Court a renunciation of his right to have letters testamentary issued to him, and asked that the same be issued to Llewellyn Jordan, couched in these terms: "The undersigned, Walter E. Jordan, named in the will of Mattie Lee Fennell as one of her executors, renounces his right to have letters testamentary issued to him. He desires that the said will shall be probated, but that letters testamentary should issue alone to the co-executor named in said will, Llewellyn Jordan."

August 12, 1897, Llewellyn Jordan filed his petition in the

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Circuit Court of the United States for the Northern Division of the Northern District of Alabama to remove to that court the matter of the proceedings to probate and to contest the will of Mattie Lee Fennell, then pending in the Probate Court, on the ground that from prejudice and local influence, he could not obtain justice in the Probate Court, or any other state court. The Circuit Court, on the same day, entered an *ex parte* order removing the cause from the Probate Court of Madison County, Alabama, to that court. Mrs. McDonnell made motions in the Circuit Court to remand the cause to the Probate Court, and to dismiss and strike from the files the petition of Llewellyn Jordan for the removal of the proceedings and cause from the state court.

Among the grounds assigned for the motion to remand were that the Circuit Court had no jurisdiction of a proceeding to probate a will; that Llewellyn Jordan was not a party defendant "in any suit, proceeding or controversy in the Probate Court of Madison County, Alabama, relating to the matter of the probate of the will of Mattie Lee Fennell, deceased," and the Circuit Court had no jurisdiction by virtue of the petition for removal; that the proceeding to establish the will was not a separate but a single controversy; that the application for removal was not made in time, or before the trial of the cause in the state court; and that the application for removal was made too late.

The Circuit Court maintained jurisdiction, and overruled each of the motions.

A trial was subsequently had in the Circuit Court, which directed a verdict in favor of Llewellyn Jordan, contestee. A verdict was returned accordingly, and thereupon the court, November 8, 1898, entered this judgment: "It is therefore considered by the court that the contest of Ada F. McDonnell of the last will and testament of Mattie Lee Fennell, deceased, and the several grounds of said contest be, and the same are hereby, overruled and denied. It is further considered and adjudged by the court that the contestee, Llewellyn Jordan, have and recover of the contestant, Ada F. McDonnell, the costs in this behalf expended, for which, if not otherwise paid, an execution may issue."

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Under the same date the court certified to this court the following questions of jurisdiction:

"1. Whether this court has jurisdiction to hear and determine the matters of controversy shown in the record between said Llewellyn Jordan and Ada F. McDonnell.

"2. Whether this court has jurisdiction to hear and determine the cause removed to this court from the state court, wherein it is sought to establish and probate the will of Mattie Lee Fennell, deceased, late a resident citizen of the county of Madison, State of Alabama.

"3. Whether this court has jurisdiction to remove the proceeding shown in the record from the state probate court upon the petition of the said Llewellyn Jordan.

"4. Whether this court acquired jurisdiction of the matters in controversy between the said Llewellyn Jordan and Ada F. McDonnell upon the petition of the said Llewellyn Jordan to remove the said proceedings from the state probate court to this court.

"5. Whether this court has jurisdiction to entertain the petition of the said Llewellyn Jordan for the removal of said proceeding to this court after the mistrial of said cause in the state probate court as shown by the record filed herein.

"6. Whether this court has jurisdiction to entertain the petition of said Llewellyn Jordan to remove said cause from the state probate court to this court after a jury had been empanelled in the state probate court, the trial entered upon, the failure of the jury to agree, and a mistrial of said cause entered in said probate court.

"7. Whether this court has jurisdiction of the petition of said Llewellyn Jordan to remove said cause from said probate court to this court after filing in said probate court an answer to the contest of said will."

A writ of error was applied for and allowed March 15, 1899, and the record showed an order on March 16 adjourning "the Circuit and District Courts of the United States for the Northern District and Northern Division" *sine die*. On the 4th of April, 1899, the judge of the Circuit Court entered on the certificate a statement that though it was dated November 8, 1898,

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it was actually signed "on the 15th day of March, 1899, at Birmingham, Alabama."

Mr. Lawrence Cooper for plaintiff in error. *Mr. William Richardson* was on his brief.

Mr. Richard W. Walker for defendant in error. *Mr. Heber J. May* was on his brief.

Mr. Chief Justice Fuller, after stating the case as above, delivered the opinion of the court.

The question of jurisdiction was certified before the adjournment of the term of the Circuit Court of the United States for the Northern District and Northern Division of Alabama, at which term the judgment was entered, and we decline, under the circumstances disclosed, to discuss what the effect might have been if the certificate had shown on its face that it was in fact signed in the Southern Division of the District within which the presiding judge had jurisdiction.

Petitions for removal and motions to remand are matters of record proper. Ordinarily papers filed in support thereof are not so unless made part thereof by bill of exceptions, though sometimes this is otherwise. *England* v. *Gebhardt*, 112 U. S. 502; *Bronson* v. *Schulten*, 104 U. S. 410; *Railroad Company* v. *Koontz*, 104 U. S. 5.

We are not concerned here with the proofs as to prejudice or local influence.

By section 4272 of the Civil Code of Alabama, it is provided that: "Upon the death of a testator, any executor, devisee, or legatee named in the will, or any person interested in the estate, may have the will proved before the proper Probate Court." As Mrs. Fennell was an inhabitant of Madison County at the time of her death, the Probate Court of that county was the proper Probate Court, § 4273; and as Walter E. Jordan and Llewellyn Jordan were named executors, and Llewellyn Jordan was the sole devisee and legatee, either of them could propound the will for probate. By section 4284 it was provided that: "Whenever

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an application is made to prove a will in this State, at least ten days' notice must be given to the widow and next of kin, or to either of them, residing and being within the State, before such application is heard." In this case Mrs. McDonnell was the next of kin and sole heir at law, and was duly notified.

Section 4287 provides that: "A will, before the probate thereof, may be contested by any person interested therein, or by any person who, if the testator had died intestate, would have been an heir or distributee of his estate, by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or of the unsoundness of mind of the testator, or of any other valid objection thereto; and thereupon an issue must be made up, under the direction of the court, between the person making the application, as plaintiff, and the person contesting the validity of the will, as defendant; and such issue must, on application of either party, be tried by a jury."

Section 4298 reads that: "Any person interested in any will, who has not contested the same under the provisions of this article, may, at any time within eighteen months after the admission of such will to probate in this State, contest the validity of the same by bill in chancery, in the district in which such will was probated, or in a district in which a material defendant resides."

Mrs. McDonnell filed her allegations in writing contesting the will on the grounds that it was not signed by the subscribing witnesses in the presence of the alleged testatrix; nor by testatrix in the presence of the subscribing witnesses; nor was the alleged will signed by the witnesses at the request of the testatrix; nor by the subscribing witnesses in the presence of each other and in the presence of the testatrix; that the testatrix at the time the alleged will was signed and executed was of unsound mind and memory and not mentally capable of making a will; that the execution of the will was procured by fraud and undue influence of Llewellyn Jordan; and that the paper propounded was not the last will and testament of Mrs. Fennell; and she demanded a jury trial. The cause was duly set down for trial as between W. E. Jordan, proponent, and

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Ada F. McDonnell, contestant, and was subsequently tried, the trial continuing some days, and on April 15, 1897, the jury being unable to agree upon a verdict, was discharged.

After this mistrial Walter E. Jordan applied to the Probate Court to allow him to make Llewellyn Jordan a party defendant to his petition that the will be admitted to probate. As Llewellyn Jordan was a co-executor, and the sole devisee and legatee, the Probate Court, on the third of August, declined to grant the application. If Llewellyn Jordan had applied to be formally admitted as co-proponent, it must be assumed that he would have been permitted to become such of record, but he made no such application. Then, on August 4, the paper purporting to be an "answer" of Llewellyn Jordan was filed by the clerk, without leave, or knowledge of the court, and on the same day was struck from the files as improvidently placed thereon. The succeeding day, August 5, Walter E. Jordan renounced the executorship, and asked that letters issue to his co-executor, Llewellyn Jordan. August 12 the order of removal was entered by the Circuit Court.

The contention of plaintiff in error is that the proceeding in the Probate Court of Madison County was simply a proceeding to establish and probate the will and as such was not a "suit of a civil nature, at law or in equity," and therefore not removable; that if the proceeding were otherwise removable, Llewellyn Jordan was not a defendant and could not remove; and that the application for removal came too late.

The decisions of the Supreme Court of Alabama recognize that an application for the probate of a will is a proceeding *in rem*, but it is held that it becomes a suit *inter partes* where there is a contest, that is, "a suit between the party alleging the existence of the will and the contestant." And that the result of the statutory provisions is to afford two modes of contest, in the Probate Court before the will has been proved, or in the Chancery Court after probate by the institution of a suit by those who were not parties to a contest in the Probate Court. *Knox* v. *Paull*, 95 Ala. 505, and cases cited.

Undoubtedly the courts of the United States possess no jurisdiction over an *ex parte* application for the probate of a will,

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that is, for the proof thereof in common form, which is purely a proceeding *in rem;* but it is insisted by defendant in error that, by the institution of a contest, a case of controversy *inter partes* arises, which may be removed to the Circuit Court just as such a contest may be under the state statute removed by change of venue from the Probate Court, where the will is propounded, to the Probate Court of another county, and that the judgment of the Federal court in such a case must be recognized by the Probate Court of original jurisdiction, just as by statute the judgment of another Probate Court to which the proceeding has been remitted is certified to that court that the will may be probated or rejected as that judgment is for or against the validity. Code 1896, § 4296.

Assuming, without deciding, this to be so, the question presents itself as to the position occupied by the proponent and the contestant, respectively, and the statute says that on a contest on admission to probate, "an issue must be made up, under the direction of the court, between the person making the application as plaintiff, and the person contesting the validity of the will, as defendant."

And the issue on this contest was made up by the Probate Court of Madison County accordingly.

Notwithstanding this, defendant in error contends that the contestant is the real plaintiff, and that, within the meaning of the act of Congress in respect of removals, "the contestee is a defendant because he is brought into court against his will by the necessity of defending his right under the will, and his involuntary presence there subjects him to the local prejudice and influence, protection against which is the object of the statute."

In this connection it is proper to say that it is obvious on the face of these proceedings that the effort of Llewellyn Jordan to become a party to the record was so limited to being made such in a particular capacity as to clearly indicate that it was with the object of making the application for removal. But whether as co-executor or as sole legatee and devisee, his appearance in the cause would be as proponent of, or on behalf of the will, and not against it, and without going into the au-

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thorities as to where the burden of proof lies when a contest is initiated as to the validity of a will, when it is presented for probate, and even conceding that the specific provision of this state statute may be disregarded, we are nevertheless of opinion that the application to remove came too late.

Under the statutes of Alabama, Llewellyn Jordan might have propounded the will, either as executor or legatee. He might have intervened as interested, if he had feared that his co-executor, who did propound the will, would not do justice, of which there is no pretence here. But he could not lie by, permit the will to be propounded, a contest to be initiated, and a trial had, and at that stage intervene and remove the case.

This was a will and testament, disposing of personal as well as of real property; and was propounded by one of two executors named therein. The statute required notice only to the widow and next of kin, and not to beneficiaries under the will.

There is nothing whatever in the evidence to indicate that Llewellyn Jordan was in fact ignorant of the will, of its presentation for probate, or of the initiation of the contest. The presumptions are against him, and he was at least so far represented by his co-executor that when he applied to come in, and treated the case as if he had come in, he took his place by intervention subject to such disabilities as to the right of removal as then existed.

In *Hanrick* v. *Hanrick*, 153 U. S. 192, 197, it was said: "The act of March 3, 1887, c. 373, corrected by the act of August 13, 1888, c. 866, was intended, as this court has often recognized, to contract the jurisdiction of the Circuit Courts of the United States, whether original over suits brought therein, or by removal from the state courts. It not only amends the act of 1875; but it allows to none but defendants the right to remove any case whatever, and, by new regulations of removals for prejudice or local influence, supersedes and repeals the earlier statutes upon this subject. 24 Stat. 553; 25 Stat. 434; *Smith* v. *Lyon*, 133 U. S. 315; *Fisk* v. *Henarie*, 142 U. S. 459; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454."

In *Fisk* v. *Henarie*, there cited, this court ruled that the words in the act of March 3, 1887, as corrected by the act of

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August 13, 1888, "at any time before the trial thereof," used in regard to removals "from prejudice or local influence," require the application to remove to be filed before or at the term at which the cause could first be tried and before the trial thereof. Tested by that ruling this application to remove came too late.

The judgment is reversed and the cause remanded to the Circuit Court with directions to remand it to the Probate Court of Madison County, Alabama.

WESTERN UNION TELEGRAPH COMPANY v. ANN ARBOR RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 202. Argued and submitted March 19, 20, 1900. — Decided May 21, 1900.

When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the Constitution and laws; and it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution, or some law or treaty of the United States, before jurisdiction can be maintained on this ground.

THIS was a bill filed in the Circuit Court of Benzie County, Michigan, by the Western Union Telegraph Company against the Ann Arbor Railroad Company, to restrain defendant from interfering with the rights of complainant in a certain telegraph line along defendant's railroad. The bill stated the Western Union Telegraph Company to be "a corporation organized and existing under the laws of the State of New York, and a citizen of the said State of New York," and the Ann Arbor Railroad Company to be "a corporation organized and existing under

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the laws of the State of Michigan and a citizen of said State of Michigan." The bill alleged that on the 25th day of September, 1890, the Frankfort and South Eastern Railroad Company, a corporation of the State of Michigan, owned and operated a railroad from Frankfort to near Copemish, Michigan; that on that day complainant entered into a contract with the Frankfort and South Eastern Railroad Company for the construction and maintenance of a telegraph line along the entire length of its road; that in pursuance of the contract and in May, June and July, 1891, complainant built the telegraph lines provided for therein; that one wire was erected for the joint use of the railroad company and complainant, and a loop to Frankfort and back was put on the poles for the exclusive use of complainant. It was further alleged that the railroad of the Frankfort and South Eastern Railroad Company was sold some time in May, 1892, and transferred to the Toledo, Ann Arbor and North Michigan Railroad Company, a corporation organized and existing under the laws of the State of Michigan; that afterwards said last-mentioned company mortgaged their entire railroad to the Farmers' Loan and Trust Company as trustee, and said mortgage being in default a bill was filed to foreclose it in September, 1893, in the Circuit Court of the United States for the Northern District of Michigan, to which foreclosure suit complainant was not a party; that the whole road was sold under order of court and conveyed to the Ann Arbor Railroad Company, and the sale and conveyance were confirmed; that the last-mentioned company now claimed to be in possession and operating the road formerly known as the Frankfort and South Eastern Railroad. And further, that the Ann Arbor Railroad Company purchased the road with full knowledge of complainant's rights, but that it insisted that it was not bound by the contract made with the Frankfort and South Eastern Railroad Company, and had given complainant written notice to that effect.

The sixth and seventh paragraphs of the bill were as follows:

"6th. Your orator is now and long has been doing an extensive telegraph business in many parts of the United States. On January 7, 1867, it filed with the Postmaster General its accept-

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ance of the provisions of the act of the United States, passed July 24, 1866.

"7th. It avers that the provisions of the contract with said Frankfort and South Eastern Railroad Company are binding on said Ann Arbor Company, and that independent of said contract it has a right to maintain its telegraph line on what was formerly said Frankfort and South Eastern Railroad under the provisions of the statute of the United States."

It was further averred that about October 1, 1895, the Ann Arbor Railroad Company took possession of complainant's wires between Thompsonville, near Copemish, and Frankfort, and cut off their connection with its other wires, and deprived complainant of telegraphic connection with Frankfort; that the value of the telegraph lines was at least the sum of $3000, and the damages arising through loss of business large but incapable of accurate calculation; that October 14, 1895, complainant reconnected the telegraph lines running from Thompsonville to Frankfort, and so again opened telegraphic communication with the latter place, and was now in full possession and use of said lines; but that complainant was justly apprehensive that, unless restrained by injunction, defendant would again seize said telegraph lines and deprive complainant of their use.

The prayer was for process and answer, "and that an injunction both preliminary and final may be issued out of and under the seal of this court, commanding the said Ann Arbor Railroad Company and all its officers and agents to absolutely desist and refrain from in any way interfering with the rights of complainant, as alleged in this bill, in the telegraph wires and poles running from Thompsonville to Frankfort, or its possession of the same, and that said defendant allow said complainant to reconnect said wires to its main line on the Chicago and West Michigan Railroad, and to use said wires for its telegraph business in the same way as it was accustomed to use them before its rights were disturbed by said defendant, and that defendant be required to carry out said contract in good faith and for such other and further or different relief, or both, as may be agreeable to equity and good conscience."

Defendant filed its petition and bond for the removal of the

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cause into the Circuit Court of the United States for the Eastern District of Michigan, alleging that it was a citizen of the State of Michigan, and that complainant was a citizen of New York, and then stating: "Your petitioner further shows to the court that the matter and amount in dispute in the above entitled cause exceeds, exclusive of interest and costs, the sum and value of two thousand dollars ($2000); that this suit is one arising under the Constitution and laws of the United States, and especially under the act of Congress of July 24, 1866, now contained in section 5263 of the Revised Statutes of the United States and the amendments thereto." The cause having been removed, defendant filed an answer and cross-bill, setting up the existence of a mortgage prior to the alleged contract and its foreclosure, and other matters. Certain facts were stipulated, and the cause submitted. The Circuit Court decreed a dismissal of the bill. From this decree an appeal was taken to the Circuit Court of Appeals, and that court affirmed the decree. 61 U. S. App. 741. From the decree of the Circuit Court of Appeals the Western Union Telegraph Company appealed to this court.

Mr. John F. Dillon for appellant. *Mr. Rush Taggart* and *Mr. George H. Fearons* were on his brief.

No appearance for appellee.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The Western Union Telegraph Company might have instituted its suit in the Circuit Court, but it sought the state tribunals as it had the right to do, and the defendant could not remove the case on the ground of diverse citizenship, although that fact existed, because it was itself a resident of the State. Defendant's application to remove, therefore, was based on the averment that the suit arose "under the Constitution and laws of the United States." Whether it did so arise depended on complainant's statement of its own case. *Tennessee* v. *Bank*,

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152 U. S. 454. And the sixth and seventh paragraphs of the bill contain all that defendant could have relied on as bringing the case within that category. These paragraphs were to the effect that complainant had accepted the provisions of the act of Congress of July 24, 1866, and that, independent of the contract, it had "a right to maintain its telegraph line on what was formerly said Frankfort and South Eastern Railroad under the provisions of the statute of the United States."

The bill was in legal effect a bill for the specific performance of the contract set up in the pleadings, and the prayer was for injunction against interference with complainant's alleged rights, and that defendant allow complainant to reconnect its said wires, and use them in the same way as before they were disturbed by defendant, "and that defendant be required to carry out said contract in good faith," and for general relief.

It was not argued by counsel for the telegraph company that the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property; and it has been long settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; "but it does provide, that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges." *Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U. S. 1. In that case Mr. Chief Justice Waite further said: "No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized."

When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination

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of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground. *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571.

We are unable to perceive that paragraphs sixth and seventh met this requirement, and it does not appear to us that they were intended to do so by the pleader. As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction. But it was argued that by virtue of the statute the telegraph company was possessed of a public character and was discharging public duties, and that although the interest it acquired by its contract was subject to the prior mortgage, it could not be absolutely deprived thereof by foreclosure, but that the Circuit Court should have so framed its decree as to preserve the occupancy of the telegraph company, subject to making compensation to the railroad company, the value of the alleged easement to be ascertained by the court. It is sufficient to say that the bill was not framed in that aspect, and though there was a prayer for general relief, relief cannot be awarded under that prayer unless it is such relief as is agreeable to the case made by the bill. And it is entirely clear that there were no averments in the bill in respect of this contention which would bring the case within the category of cases arising under the Constitution or laws of the United States so that jurisdiction could be held to have rested on that ground.

The result is that the decrees of the Circuit Court of Appeals and of the Circuit Court must be reversed, and the cause be remanded to the latter court with a direction to remand it to the state court, and it is so ordered.

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CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY v. MARTIN.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 135. Submitted January 31, 1900.—Decided May 21, 1900.

This was an ordinary action, under a state statute, for wrongfully causing the death of plaintiff's intestate, in which no Federal question was presented by the pleadings, or litigated at the trial, and in which the liability depended upon principles of general law, and not in any way upon the terms of the order appointing the receivers; and whatever the rights of the receivers might have been to remove the cause if they had been sued alone, the controversy was not a separable controversy within the intent and meaning of the act of March 3, 1887, as corrected by the act of August 13, 1888, and this being so, the case came solely within the first clause of the section, and it was not intended by Congress that, under such circumstances, there should be any difference between the rule applied under the first and second clauses of the act.

THIS was an action brought by Lissa Martin as administratrix of William Martin, deceased, against the Chicago, Rock Island and Pacific Railroad Company, and Clark and others, receivers of the Union Pacific Railway Company, in the District Court of Clay County, Kansas, to recover damages for the death of the decedent. Plaintiff's petition was filed January 26, 1894, and on February 14, 1894, the Chicago, Rock Island and Pacific Railroad Company filed its separate answer thereto. February 20, 1894, defendants Clark and others, as receivers, presented their petition and bond, praying for the removal of the cause to the United States Circuit Court for the District of Kansas, on the ground that the case arose under the Constitution and laws of the United States, which application was overruled by the District Court, and the receivers duly excepted. The cause was tried, the jury returned a verdict in favor of plaintiff and against all the defendants, and judgment was entered thereon. The cause was taken on error to the Supreme Court of Kansas by the defendants, and the judgment was by that court affirmed. 59 Kansas, 437.

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The refusal of the state court to remove the cause to the Circuit Court of the United States on the application of the receivers was relied on as error throughout the proceedings, and the Supreme Court of Kansas held, among other things, that the application for removal was properly denied because all the defendants were charged with jointly causing the death of plaintiff's intestate, and all did not join in the petition for removal.

Mr. M. A. Low, *Mr. Winslow S. Pierce*, *Mr. W. R. Kelly*, *Mr. W. F. Evans*, *Mr. A. L. Williams* and *Mr. N. H. Loomis* for plaintiffs in error.

Mr. A. A. Godard and *Mr. F. B. Dawes* for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court.

Assuming that as to the receivers the case may be said to have arisen under the Constitution and laws of the United States, the question is whether it was necessary for the Chicago, Rock Island and Pacific Railroad Company, defendant, to join in the application of its co-defendants, the receivers of the Union Pacific Railway Company, to effect a removal to the Circuit Court.

The Rock Island Company was not a corporation of Kansas, and all the receivers of the Union Pacific Railroad Company were citizens of some other State than the State of Kansas. But the receivers applied for removal, after the Rock Island Company had answered, on the ground that the suit was, as to them, "one arising under the laws of the United States," in that they were appointed receivers by the Circuit Court of the United States for the Districts of Nebraska and Kansas, to take charge of and to operate, a corporation created by the consolidation, under acts of Congress, of a corporation of the United States, a corporation of Kansas and a corporation of Colorado.

The act of March 3, 1887, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, § 2, provides:

"That any suit of a civil nature, at law or in equity, arising

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under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States, for the proper district. Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such state court. . . ."

It thus appears on the face of the statute that if a suit arises under the Constitution or laws of the United States, or if it is a suit between citizens of different States, the defendant, if there be but one, may remove, or the defendants, if there be more than one; but where the suit is between citizens of different States and there is a separable controversy, then either one or more of the defendants may remove.

Under the first clause of section 2 of the act of 1875, 18 Stat. 470, c. 137, which applied to "either party," but in its reenactment in the second clause of section 2 of the act of 1887,

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above quoted, is confined to the defendant or defendants, it was well settled that a removal could not be effected unless all the parties on the same side of the controversy united in the petition; and so as to the second clause of the second section of the act of 1875, which corresponds with the third clause of the second section of the act of 1887, it was held that that clause only applied where there were two or more controversies in the same suit, one of which was wholly between citizens of different States. *Hanrick* v. *Hanrick*, 153 U. S. 192, and cases cited; *Torrence* v. *Shedd*, 144 U. S. 527, and cases cited. In the latter case Mr. Justice Gray said: "As this court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any one of the defendants, 'separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defence may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'" And see *Whitcomb* v. *Smithson*, 175 U. S. 635.

There was no separable controversy here. The case presented a joint cause of action against all the defendants, and, indeed, the removal was applied for on the ground that the suit arose under the Constitution and laws of the United States. It, therefore, came within the first clause of the section quoted, and if the same rule governs proceedings under that clause that obtains in respect of the second clause, the judgment of the Supreme Court of Kansas must be affirmed. And in view of the language of the statute we think the proper conclusion is that all the defendants must join in the application under either clause.

We do not regard *Sonnenthiel* v. *Moerlein Brewing Company*, 172 U. S. 401, as in point. There an action had been brought in the Circuit Court of the United States for the Eastern Dis-

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trict of Texas by a citizen of Texas, against an Ohio corporation and a United States marshal, the jurisdiction depending as to one defendant on diverse citizenship, and as to the other on the case arising under the Constitution and laws of the United States, and the question was whether the judgment of the Circuit Court of Appeals was made final by the act of March 3, 1891, which we held it was not, as the jurisdiction was not dependent entirely upon the opposite parties to the suit being citizens of different States.

Mitchell v. *Smale*, 140 U. S. 406, is, however, justly pressed on our attention as of weight in the disposition of the particular question raised in this case.

The case was this: Mitchell was a citizen of Illinois, and commenced an action of ejectment in the Circuit Court of Cook County, in that State, against three defendants, Jabez G. Smale, and John J. and Frank I. Bennett. The Bennetts, who were attorneys, appeared specially for Conrad N. Jordan, and moved that he be substituted as sole defendant. The motion was made upon an affidavit of Jordan that the Bennetts had no interest, having conveyed the property to him before the suit was commenced, and that Smale was a mere tenant under him, Jordan, and had no other interest. The court denied the motion, and thereupon Jordan was admitted to defend the cause as landlord and codefendant. Afterwards, and in due time, Jordan filed a petition, under the act of 1875, for the removal of the cause into the Circuit Court of the United States, alleging as ground of removal that the plaintiff was a citizen of Illinois, and that he, Jordan, was a citizen of New York, and was the owner of the property, and that the sole controversy in the case was between him, Jordan, and the plaintiff, stating the facts previously affirmed in his affidavit as to the want of interest in the Bennetts, and the tenancy of Smale. Subsequently Jordan obtained leave to amend his petition, and amended it so as to set up that as between him and plaintiff the controversy involved the authority of the Land Department of the United States to grant certain patents, under which he claimed the right to hold the land in dispute, after and in view of the patent under which plaintiff claimed the same land. As Smale was merely a tenant,

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the court held that there was no good reason why the contest respecting the title might not have been carried on between Jordan and plaintiff alone so far as Smale was concerned; but as to the Bennetts the court thought there was greater difficulty in sustaining a removal, because they were made defendants apparently in good faith, and were not acknowledged to be tenants of Jordan, and plaintiff might well insist on prosecuting his action against them, as well as against Jordan, in order that, if he should be successful, there might be no failure of a complete recovery of the land claimed by him, but inasmuch as Jordan exhibited a claim under the authority of the United States, which was contested by Mitchell on the ground of the want of that authority, while it was true that laws of the State of Illinois might be invoked by the parties, still it was no less true that the authority of the United States to make the grant relied on would be necessarily called in question. In view of that defence the jurisdiction was sustained apparently on the ground that there was a separable controversy, and the particular terms of the different clauses of the statute were really not discussed.

The case was a peculiar one, and we must decline to allow it to control the determination of that before us.

In *Gold Washing and Water Company* v. *Keyes*, 96 U. S. 199, 203, Mr. Chief Justice Waite said: "A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . . Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading, that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law

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or treaty of the United States." *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571.

In *Mitchell* v. *Smale*, the claim of Jordan was treated by the court as coming within that ruling, but the case before us does not. This was an ordinary action under a state statute for wrongfully causing the death of plaintiff's intestate. No Federal question was in fact presented by the pleadings nor litigated at the trial. The liability depended on principles of general law applicable to the facts, and not in any way upon the terms of the order appointing the receivers. Whatever the rights of the receivers to remove the cause if they had been sued alone, the controversy was not a separable controversy within the intent and meaning of the act. This being so, the case came solely within the first clause of the section, and we are of opinion that it was not intended by Congress that, under such circumstances, there should be any difference between the rule applied under the first and the second clauses of section 2 of the act of 1887–8.

Judgment affirmed.

RIDER v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 40. Argued November 1, 1899. — Decided May 14, 1900.

The fourth and fifth sections of the River and Harbor Act, approved September 19, 1890, provide: "§ 4. That section nine of the River and Harbor Act of August 11th, 1888, be amended and reënacted so as to read as follows: That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width or span, or otherwise, or where there is difficulty in passing the draw-opening of the draw-span of such bridge by rafts, steamboats or other water crafts, it shall be the duty of said Secretary, first giving the parties reasonable oppor-

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tunities to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes to be made and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the District in which such bridge is situated to the end that the criminal proceedings mentioned in the succeeding section may be taken. § 5. That section ten of the River and Harbor Act of August 11th, 1888, be amended and reënacted so as to read as follows: That if the persons, corporations or associations owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such person, corporation or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5000, and every month such person, corporation or association shall remain in default as to the removal or alteration of such bridge, shall be deemed a new offence and subject the person, corporation or association so offending to the penalties above described." 26 Stat. 426, 453, c. 907. Proceeding under that act the Secretary of War gave notice to the County Commissioners of Muskingum County, Ohio, to make on or before a named day certain alterations in a bridge over the Muskingum River, Ohio, at Taylorsville in that State. The Commissioners, although having control of the bridge did not make the alterations required and were indicted under the act of Congress. *Held*, that however broadly the act of Congress may be construed it ought not to be construed as embracing officers of a municipal corporation owning or controlling a bridge who had not in their hands, and under the laws of their State could not obtain, public moneys that could be applied in execution of the order of the Secretary of War within the time fixed by that officer to complete the alteration of such bridge.

THE case is stated in the opinion of the court.

Mr. Frank H. Southard and *Mr. Simeon M. Winn* for plaintiffs in error.

Mr. George Hines Gorman for defendants in error. *Mr. Solicitor General* was on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a prosecution under a criminal information filed on

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behalf of the United States against the plaintiffs in error as Commissioners of the County of Muskingum, Ohio, having power under the laws of Ohio to control, alter and keep in repair all necessary bridges over streams and public canals on all state and county roads.

The information was based upon the fourth and fifth sections of the River and Harbor Act, approved September 19, 1890.

Those sections are as follows:

"§ 4. That section nine of the River and Harbor Act of August 11th, 1888, be amended and reënacted so as to read as follows: That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw-opening or the draw-span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunities to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the District in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken.

"§ 5. That section ten of the River and Harbor Act of August 11th, 1888 be amended and reënacted so as to read as follows: That if the persons, corporation or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the Secretary of War and within the time prescribed by him, wilfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such persons, corpo-

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ration or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5000, and every month such persons, corporation or association shall remain in default in respect to the removal or alteration of such bridge, shall be deemed a new offence, and subject the persons, corporation or association so offending to the penalties above described." 26 Stat. c. 907, 426, 453.

Under power conferred by an act of the General Assembly of Ohio, approved March 9, 1836, the authorities of the State, between 1836 and 1840, constructed a series of locks and dams on the Muskingum River between Marietta and Zanesville.

About the year 1838, under the authority of the State, a dam was constructed across the main channel of the Muskingum River at the rapids which entirely obstructed navigation at that point, but locks and a side-cut canal were constructed so that boats could pass southward to the river below the rapids. Immediately below that dam the Commissioners of Muskingum County, about the year 1874, under the authority of the state, constructed a bridge across the river — the bridge here in question — whereby the towns of Duncan Falls and Taylorsville on opposite sides of the river were connected.

On the 2d day of May, 1885, the State of Ohio made a cession to the United States of the Muskingum River with its improvements. The act of cession contained this provision: "And for the purpose of enabling the United States to expend any sum of money that is or may hereafter be appropriated by Congress for the improvement of the Muskingum River, the State of Ohio hereby transfers and cedes to the United States the eleven locks and dams heretofore constructed by said State on said river, together with all the grounds, canals and appurtenances belonging to the same, subject to the provisions of the preceding sections of this act, as to the jurisdiction of the United States over the lands and buildings authorized to be acquired and constructed by said sections, and imposing penalties for injuries to said work which shall extend and apply to the said eleven docks and dams and their appurtenances hereby transferred and ceded to the United States, but the custody and ownership of said Muskingum River improvement shall remain

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in the State of Ohio, until such time as the United States appropriates sufficient money to properly improve and operate the same." 82 Laws of Ohio, 220, 221.

The cession was accepted by the United States as is shown by the River and Harbor Act of August 5, 1886, c. 929, which contained this clause: "And the United States hereby accepts from the State of Ohio the said Muskingum River improvements, and all the locks, dams and their appurtenances, and the canals, belonging to said improvement, and all the franchises and property of every kind and rights in said river, and its improvements, now owned, held and enjoyed by the State of Ohio, including all water leases and rights to use water under and by virtue of any lease of water now running and in force between the State of Ohio and all persons using said water, hereby intending to transfer to the United States such rights in said leases and contracts as are now owned, held or reserved by the State of Ohio; but not to affect any right to the use of the water of said river now owned and held by the lessees of any water rights under any lease or contract with the State of Ohio. And the United States hereby assumes control of said river, subject to the paramount interest of navigation. The provisions of this act, so far as they relate to the Muskingum River, shall not take effect, nor shall the money hereby appropriated be available, until the State of Ohio, acting by its duly authorized agent, turns over to the United States all property ceded by the act of the General Assembly aforesaid, and all personal property belonging to the improvement aforesaid, and used in its care and improvement, and any balance of money appropriated by said State for the improvement of said river, and which is not expended on the fifteenth day of July, 1886." 24 Stat. 310, 324.

By deed of January 31, 1887, the Board of Public Works of Ohio, under legislative sanction, conveyed to the United States all the lands and tenements, with the rights and appurtenances thereto belonging, then owned, held and enjoyed by the State and theretofore occupied and used for canal and other purposes and known as the Muskingum River improvement.

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During the years 1890 and 1891 the United States caused to be constructed a lock at the head of the rapids in the dam which the local authorities had maintained, and constructed from that lock down the river, under the bridge and through the rapids, an artificial canal outside of the main channel of the river, and raised the locks and dam on the river below, thus providing a new means of navigation at that point.

In the judgment of the United States' engineer having in charge the improvement of the Muskingum River, the construction by the Government of the new lock at Taylorsville made it necessary to place a draw in the Taylorsville bridge just below that lock. Of this fact the County Commissioners were informed, and they were given an opportunity to submit such statements, propositions and evidence bearing upon the matter as they might deem pertinent. Finally the following notice was issued from the War Department and served upon the commissioners:

"WAR DEPARTMENT.

"WASHINGTON CITY, February 25th, 1891.

"To the County Commissioners of Muskingum County, Ohio:

"Take notice that—

"Whereas the Secretary of War has good reason to believe that the bridge owned and controlled by Muskingum County, Ohio, across the Muskingum River, between Taylorsville and Duncans Falls, is an unreasonable obstruction to the free navigation of said river, (which is one of the navigable waters of the United States,) on account of not being provided with a draw span below the new United States lock No. 9 in said river; and

"Whereas the following alteration will render navigation through it reasonably free, easy and unobstructed, to wit, the construction of a draw span in said bridge below the said lock in accordance with the span shown on the map hereto attached; and

"Whereas to the 30th day of September, 1891, is a reasonable time in which to alter the said bridge as described above:

"Now, therefore, in obedience to and by virtue of the fourth

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and fifth sections of an act of the Congress of the United States, entitled 'An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes,' approved September 19th, 1890, Redfield Proctor, Secretary of War, does hereby notify the said County Commissioners of Muskingum County, Ohio, to alter the said bridge as described above, and prescribes that said alteration shall be made and completed on or before the 30th day of September, 1891.

"L. A. GRANT,
"*Assistant Secretary of War.*"

No alteration of the bridge having been made by the Commissioners within the time limited by the Secretary of War, the present information was filed against them on the 23d day of November, 1891. The information, after referring to the official character of the defendants and setting out the facts showing the action of the War Department touching the proposed alteration of the bridge, charged that the defendants as County Commissioners of Muskingum County "did unlawfully, on, to wit, the 15th day of October, 1891, at the place aforesaid, and after receiving notice to that effect, as hereinbefore required from the Secretary of War, and within the time prescribed by him, wilfully fail and refuse to comply with the said order of the Secretary of War, and to make the alterations set forth in said notice, contrary to the form of sections four and five of an act of Congress approved September 19th, 1890."

A trial was had which resulted in a verdict of guilty. A motion for new trial having been entered, the judges before whom it was argued differed in opinion, and certified the following points of disagreement to this court: 1. Whether Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by said sections 4 and 5 of the act of September 19, 1890, to determine when a bridge is an unreasonable obstruction to the free navigation of a river. 2. Whether the failure to comply by persons owning and controlling the said bridge with the order of the Secretary of War could lawfully subject them to a penalty for a misdemeanor.

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This court held that since the passage of the judiciary act of March 3, 1891, 26 Stat. 826, c. 517, certificates of division of opinion in criminal cases, according to §§ 651 and 697 of the Revised Statutes, were not authorized. *United States* v. *Rider*, 163 U. S. 132, 139. The certificate of division of opinion in this case was accordingly dismissed. Upon such dismissal the motion for new trial was denied in the Circuit Court in accordance with the opinion of the presiding judge, and it was adjudged that each of the defendants be fined in the sum of ten dollars. From that judgment the present writ of error has been prosecuted.

We have seen that by the fourth section of the River and Harbor Act of 1890 the Secretary of War was authorized, after due notice to the parties interested and after hearing them, to require persons or corporations owning or controlling any bridge over a navigable waterway of the United States which he had good reason to believe was an unreasonable obstruction to the free navigation of such waterway, to so alter the bridge as to render the navigation through or under it reasonably free, easy and unobstructed; and that by the fifth section of the same act it was made a misdemeanor for any person, corporation or association to wilfully fail or refuse to comply with the lawful order of the Secretary.

The plaintiffs in error contend that those provisions are inconsistent with the Constitution of the United States in that Congress has assumed to give the Secretary of War authority to determine matters that are legislative in their nature.

On behalf of the Government it is contended that the act of Congress has not delegated legislative power to the Secretary but has only given to that officer authority to determine the existence of certain facts as the foundation of such action by him as might be necessary to give effect to the declared purpose of Congress to remove unreasonable obstructions to the free navigation of the waterways of the United States. *Field* v. *Clark*, 143 U. S. 649, 693.

The discussion of counsel also involved the question whether —assuming the act in question not liable to the objection that it delegated legislative power to the Head of an Executive De-

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partment—the expense to be incurred in the alteration of the bridge in question, which was originally constructed in accordance with law, must not be borne by the United States, which by its own agents made the proposed alteration of the bridge necessary for the purposes of navigation.

These are questions of very considerable importance. But in the view we have taken of the case, their determination is not now necessary. The record presents another question which, being determined in favor of the plaintiffs in error, requires a reversal of the judgment upon grounds that will protect them altogether against the present prosecution for not complying with the order issued from the War Department.

At the trial in the Circuit Court it was proved that the notice from the War Department to the County Commissioners to make and complete the required alteration of the bridge between Taylorsville and Duncan Falls on or before September 30, 1891, was served in March of that year; that there were then no funds in the hands of the Commissioners legally available for the purpose of making the proposed changes in the bridge; and that under the laws of Ohio defining and limiting the powers of the Commissioners, it was not possible for them by any levy of taxes to raise the money necessary to alter the bridge within the time limited by the notice from the Secretary of War or before the commencement of this prosecution.

It has not been suggested, nor could it reasonably be held, that the County Commissioners were bound, in any case, to provide out of their own private estates the money (several thousand dollars) necessary for the proposed alteration of the bridge, or that they could be made liable criminally for not so doing. The notice was addressed to them in their official capacity, and the prosecution against them was for failing to perform the duty alleged to be imposed upon them by the act of Congress. What they could or could not lawfully do, in the execution of the powers conferred upon them, must of course be determined by the laws of the State under whose authority they acted.

Assuming, for the purposes of the present decision, that the words "the persons, corporation or association owning or con-

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trolling any railroad or other bridge," may, under some circumstances, apply to officers of municipal corporations, charged generally with the control and repairing of bridges owned by such corporations, the question remains whether any error of law was committed at the trial to the prejudice of the plaintiffs in error. The court charged the jury among other things: "Congress had the constitutional power to confer upon the Secretary of War the authority to determine when a bridge such as the bridge in question is an unreasonable obstruction to the free navigation of a river, and that the failure to comply by the person owning and controlling any such bridge, as by the defendants in this case, if they should so find, with such a determination by the Secretary of War, after due notice and otherwise full compliance with the act of Congress in that behalf, lawfully subjected them to prosecution for a misdemeanor, as provided by the act of Congress."

To this instruction the defendants duly excepted. Assuming the act of 1890 not liable to any constitutional objection, we think that the court, in view of the evidence, erred in saying, as in effect it did, that the mere failure of the defendants to comply with the order of the Secretary brought them within the act of Congress and subjected them to prosecution. The charge ignored altogether the proof showing that the defendants had no public moneys which they could have applied to the alteration of the bridge, and that under the laws of the State no money could be obtained, by way of taxation so as to make the required alteration within the time fixed by the Secretary of War. The court made the guilt of the accused depend alone upon the inquiry whether they had complied with the order of the Secretary of War. This was error. It ought not to be supposed that Congress intended, even if it had the power, to subject officers of a State to criminal prosecution for not doing that which it was impossible for them to do consistently with the laws of the State defining and regulating their powers and duties.

It is said that the record does not show that the Commissioners, prior to the order of the Secretary of War, suggested any want of public moneys in their hands that could be used in

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altering the bridge or any want of power under the laws of the State to raise money for such a purpose by taxation, within the time limited for doing the work ordered. This is an immaterial circumstance. The record does show that the Commissioners from the outset protested against the expense of the proposed alteration being put upon the county and insisted that the United States, acting by its officers, having made that alteration necessary it should bear such expense. Nothing done or omitted to be done by the Commissioners estopped them from making any defence which the facts in the case justified. The liability of the Commissioners to criminal prosecution could not depend upon their mere failure to state to the engineer in charge of the Muskingum River improvements all that might have been urged against the demand made upon them by that officer.

We are of opinion that, however broadly the act of 1890 may be construed, it ought not to be construed as embracing officers of a muncipal corporation owning or controlling a bridge who had not in their hands, and under the laws of their State could not obtain, public moneys that could be applied in execution of the order of the Secretary of War within the time fixed by that officer to complete the alteration of such bridge. If the court on its own motion had instructed the jury, under the evidence in this case, to find for the defendants, it could not be held to have erred.

The judgment is reversed, with directions for further proceedings consistent with this opinion.

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NORTH AMERICAN TRANSPORTATION & TRADING COMPANY *v.* MORRISON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

No. 203. Submitted March 20, 1900.—Decided May 21, 1900.

Where a plaintiff asserts, as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a mere *ad damnum* clause will not confer jurisdiction on the Circuit Court, but the court on motion or demurrer, or of its own motion, may dismiss the suit.

In the circumstances disclosed by the plaintiff's declaration, and in the certificates of the trial judge, the defendant company, though liable in a court of competent jurisdiction for the other claims asserted, cannot be held for the amount of wages or profits which the plaintiff suggests he might have earned had he reached Dawson City.

THIS was an action originally brought in December, 1897, in the Superior Court of the State of Washington for King County, by Donald Morrison against the North American Transportation and Trading Company, and subsequently, on petition of the defendant company, removed to the Circuit Court of the United States for the District of Washington. To the declaration, containing several counts, the defendant demurred. The demurrer was overruled, and the cause was tried before the District Judge and a jury. After verdict and judgment in favor of the plaintiff, the District Judge certified the following statement of facts and questions of jurisdiction to this court:

"I, C. H. Hanford, District Judge, presiding in the Circuit Court aforesaid, and the judge before whom the above-entitled cause was tried, do now, on the 29th day of December, 1898, being the December term, at which the judgment and verdict were entered herein, certify as follows:

"Morrison, the plaintiff, alleging himself to be a citizen and resident of the State of Minnesota, began this action in the Superior Court of King County, State of Washington, against the defendant, alleging it to be a corporation organized and ex-

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isting under the laws of the State of Illinois, and engaged in business in the State of Washington. The suit was upon eight causes of action, the first on plaintiff's own account, the other on account of seven alleged assignors of plaintiff. The citizenship of these assignors was nowhere alleged.

"Defendant removed the case to this court on the ground of diversity of citizenship between it and plaintiff Morrison, and the involving of a sum exceeding two thousand dollars, exclusive of interest and costs. After removal defendant demurred to each cause of action in the complaint as not sufficient to constitute a cause of action, and as to the last seven causes of action on the additional ground that the court had no jurisdiction to hear it, and this was overruled, with exception to defendant. Issue was then joined, and, after two trials, judgment was entered as now complained of in error in the sum of $2119.50. After the verdict and before judgment defendant moved to dismiss or remand the whole cause and each cause of action on the ground that as to the first cause of action it did not involve two thousand dollars, exclusive of interest and costs, and as to the second and each subsequent cause of action —that is to say, as to the assigned causes of action—that each of these did not involve two thousand dollars, exclusive of interest and costs, and because, also, it did not appear that proper diversity of citizenship existed at the time of the commencement of the action, or at the time of its removal, between the assignors of plaintiff and defendant so as to confer jurisdiction upon the Federal court; which said motion to dismiss and remand was denied, with exception to defendant.

"The original complaint shows that the aggregate sum sued for by Morrison was $18,173.50, divided, as already stated, into eight causes of action. The suit was upon eight contracts of carriage, between defendant as a carrier and plaintiff and his seven assignors, from Seattle to Dawson City, by way of St. Michaels and the Yukon River, which contracts were alleged to have been broken by the carrier by failure and refusal to transport the passengers farther than Fort Yukon on the river.

"The first cause of action — that of plaintiff himself — alleged himself to be a citizen and a resident of Minnesota and defend-

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ant a corporation organized and existing under the laws of the State of Illinois. The contract was alleged to have been made at Seattle on the 30th day of July, 1897, and the agreed date of the delivery of the plaintiff at Dawson by the carrier was alleged to be September 15, 1897, and this suit was brought on the 17th day of November, 1897. On the breach of the contract at Fort Yukon, plaintiff alleged himself compelled to return to Seattle. The damages claimed by him were as follows: (*a*) The price of his ticket from Seattle to Dawson City, $200.00; (*b*) $72.50, returning to Seattle after the breach of contract at Fort Yukon; (*c*) expense of one dollar a day and loss of time at three dollars a day at Seattle since his return there, the 18th day of October, 1897; (*d*) three dollars a day from the 30th day of July, 1897, which he could have earned if he had not started on the journey at all; (*e*) fifteen dollars a day which he could have earned for a year at Dawson after the 15th day of September, 1897; (*f*) lost baggage, $29.50; the total prayer of this cause of action being $2301.75.

"The second and subsequent causes of action, being the assigned causes, arose on exactly similar contracts of carriage. The citizenship of the respective assignors was not averred. The damages claimed were exactly the same as those claimed by plaintiff himself, excepting that none of the assignors claimed the item of lost baggage, and that the item of cost in returning from Fort Yukon to Seattle was as low as $61.50 in some instances, and as high as $103.25 in others. The lowest sum claimed by any of the assignors as his total damage was $2261.25, and the highest claimed was $2303.25.

"Neither in the original nor the assigned causes of action was it alleged that any of these passengers had ever lived in Dawson before, had any previous engagement or business there, or any promise of employment, the allegation in each cause of action as to the passenger's damage in this respect being that 'he could have obtained employment and engaged in business by him competent to perform and transact at or about said Dawson City, and thereby secured wages and profits at the rate of fifteen dollars per day continuously from September 15, 1897, for the period of the year thence next ensuing,' and that 'he

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has wholly lost all of said employment and time, and all of said wages and profits, to his damage in the sum of $2000.' It was not alleged what, if any, occupation either plaintiff or any of his assignors had before departure on the journey, nor was it alleged what occupation was expected at the point of destination, or that any expected occupation was communicated to the defendant.

"Now, therefore, I do certify to the Supreme Court the following question of jurisdiction, as follows:

"Whether the motions to dismiss and to remand should have been granted because at the time of removal to this court the cause was one of which this court could not take jurisdiction — that is to say, whether —

"(*a*) In each of the causes of action the sum or value of the matter actually in dispute, as shown in the pleadings was less than two thousand dollars, exclusive of interest and costs, and a controversy was involved substantially within the jurisdiction of this court; and whether —

"(*b*) If the foregoing be answered in the affirmative, the amounts claimed in the assigned causes of action could be united to that in the first to make up the jurisdictional amount, the citizenship of the assignors not being alleged; and whether —

"(*c*) Supposing the jurisdictional amount was sufficient in each cause of action, the case was even then removable to this court when the necessary diversity of citizenship was alleged only in the first cause of action, and was not alleged in those assigned."

Mr. Frederick Bausman for plaintiff in error.

Mr. John Arthur and *Mr. L. H. Wheeler* for defendant in error.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

This is a suit by Donald Morrison, alleging himself to be a citizen of the State of Minnesota, against the North American

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Transportation and Trading Company, a corporation of the State of Illinois, for damages arising out of a breach of a contract whereby the transportation company had agreed to carry the plaintiff and his baggage from Seattle in the State of Washington to Dawson City in the Northwest Territory, in the Dominion of Canada.

It is conceded that the defendant company failed, without sufficient excuse, to fulfill its engagement, and the question upon which the jurisdiction of the court below depended is as to the nature and amount of the damages to which the plaintiff is entitled. The allegations in the complaint in that respect were, first, the sum paid by the plaintiff as a fare being $200; second, the expenses caused by having to return to Seattle, amounting to $72.50; third, the wages which he could and would have earned at Seattle if he had not proceeded upon the attempted journey, being wages at the rate of three dollars per day during all the time intervening between August 3, 1897, and November 17, 1897, amounting to about $320; fourth, the loss of a certain portion of plaintiff's baggage, amounting to $29.25; and, fifth, the loss occasioned plaintiff by the defendant's failure to transport him to Dawson City, "where the plaintiff could have obtained employment and engaged in business which he was competent to perform and transact, at or about Dawson City, and thereby have secured wages and profits at the rate of fifteen dollars per day continuously from September 15, 1897, for the period of the year next ensuing;" "by reason whereof there is due and owing the plaintiff from the defendant by reason of the premises, for said expenditures, outlay and damages, the sum of two thousand three hundred and one dollars and seventy-five cents."

It was obvious, on the face of the plaintiff's complaint, that if he was not entitled to recover the money which he alleged "he could have earned and secured by obtaining employment and engaging in business at or about Dawson City," the amount necessary to give the Circuit Court jurisdiction was not involved.

While it has sometimes been said that it is the amount claimed by the plaintiff in his declaration that brings his case within the jurisdiction of the Circuit Court, that was in suits for un-

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liquidated damages, in which the amount which the plaintiff was entitled to recover was a question for the jury; an inspection of the declaration did not disclose and could not disclose but that the plaintiff was entitled to recover the amount claimed, and hence, even if the jury found a verdict in a sum less than the jurisdictional amount, the jurisdiction of the court would not be defeated. *Barry* v. *Edmunds*, 116 U. S. 550; *Scott* v. *Donald*, 165 U. S. 58, 89.

But where the plaintiff asserts, as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a mere *ad damnum* clause will not confer jurisdiction on the Circuit Court, but the court on motion or demurrer, or of its own motion, may dismiss the suit. And such, we think, was the present case.

We do not consider it necessary to enter upon a discussion of the rule that a person is not to be held responsible in damages for the remote consequences of every negligent act, but only for those which are proximate or natural, and shall content ourselves by stating our conclusion that, in the circumstances disclosed by the plaintiff's declaration and in the certificate of the trial judge, the defendant company, though liable in a court of competent jurisdiction for the other claims asserted, cannot be held for the amount of wages or profits which the plaintiff suggests he might have earned had he reached Dawson City.

In the District Judge's certificate it is stated that the plaintiff did not allege that he had ever lived in Dawson City before, or had any previous engagement or business there or any promise of employment; that it was not alleged what, if any, occupation the plaintiff had before his departure on the journey, nor what occupation was expected at the point of destination, or that any expected occupation or employment was communicated to the defendant company.

The plaintiff was traveling to a land of promise, hoping to there procure some occupation, he knew not what, or to engage in some business, he knew not what. The result of such an adventure cannot be foretold, and the plaintiff's anticipations afford no safe ground on which to base a claim for damages.

If, then, the plaintiff in respect to his own claim, did not dis-

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close a case of which the Circuit Court had jurisdiction, did he overcome that difficulty by the additional counts in which he alleged himself to be the assignee of several other voyagers who had suffered loss and damages similar to those claimed by him on his own behalf? The citizenship of the assignors was not alleged, and the greater portion of the respective claims consisted of matter which we have held in reference to plaintiff's own claim to be too remote and uncertain to be allowed.

It is somewhat uncertain, upon the facts alleged in the declaration and those stated to us in the certificate of the District Judge, whether if all the claims, as well those assigned and those held by the plaintiff in his own right, omitting those which we have held to be too remote and uncertain, were aggregated, they would reach the necessary jurisdictional amount. But however that may be, as it is not alleged that the assignors could have themselves prosecuted suit in the Circuit Court, it is the settled construction of the statutes of the United States that the suit cannot be maintained in favor of the assignee.

Serè v. *Pitot*, 6 Cranch, 332, was an action commenced to foreclose a mortgage given by a citizen of Louisiana to another citizen of the same State. The language of the judiciary act of 1789 was as follows: "Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made." 1 Stat. 78. The plaintiff was the general assignee in insolvency of the mortgagor, and was an alien; and it was said by Chief Justice Marshall, delivering the opinion of the court:

"Without doubt assignable paper, being the chose in action most usually transferred, was in the mind of the legislature when the law was framed, and the words of the provision are, therefore, best adapted to that class of assignments. But there is no reason to believe that the legislature were not equally disposed to except from the jurisdiction of the Federal courts those who could sue in virtue of equitable assignments and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant might, under certain circumstances, be

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permitted to sue in equity in his own name, and there would be as much reason to exclude him from the Federal courts as to exclude the same person when the assignee of a particular note. The term 'other chose in action' is broad enough to comprehend either case, and the word 'contents' is too ambiguous in its import to restrain that general term. The contents of a note are the sums it shows to be due, and the same, without much violence to the language, can be said of an account."

And the same construction was put upon the language of the act of August 13, 1888, c. 866, 25 Stat. 433. *Mexican National Railroad* v. *Davidson*, 157 U. S. 201.

We do not think that it was competent for the plaintiff to add to his own cause of action, in order to obtain jurisdiction in the Circuit Court, claims assigned by those whose citizenship and residence did not appear either in the complaint or in the petition for removal. As, however, the plaintiff brought his action in the state court, where he was entitled to join the assigned claims with his own, and as the case was removed into the Federal court at the instance of the defendant company, whose motion to remand the case we are now obliged to sustain, we impose the costs in the Circuit Court and in this court on the North American Transportation and Trading Company, the plaintiff in error.

These views render it needless to answer severally the questions certified.

Accordingly the judgment of the Circuit Court is reversed, and the cause is remanded to that court, with directions to remand the cause to the state court.

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PITTSBURGH AND LAKE ANGELINE IRON COMPANY *v.* CLEVELAND IRON MINING CO.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 260. Argued April 24, 25, 1900. — Decided May 21, 1900.

For the reasons set forth in the opinion of the court, the case was dismissed for want of jurisdiction.

THE case is stated in the opinion of the court.

Mr. F. O. Clark for plaintiff in error. *Mr. Alfred Russell* was on his brief.

Mr. Benton Hanchett and *Mr. James H. Hoyt* for defendants in error. *Mr. A. C. Dustin* and *Mr. George Hayden* were on their briefs.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The plaintiff in error and the defendants in error were respectively plaintiff and defendant in the court below, and we will so designate them. They were riparian owners on a body of water called Lake Angeline, in the State of Michigan, and this suit is to determine the extent of their respective ownerships to the bed of the lake. They all derived title through United States patents, and the controversy is claimed by plaintiff to arise from their construction and effect.

The trial court dismissed plaintiff's bill, and its action was affirmed by the Supreme Court of the State, 76 N. W. Rep. 395, and this writ of error was then sued out.

A motion is made to dismiss for want of jurisdiction in this court, on the ground that no Federal question was raised in the state court, or, if one was raised, the decision of the state court was rested on a question not Federal, which was sufficient to sustain the judgment.

Under the circumstances of this case it will be more orderly

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to consider the latter ground first, and its proper determination requires a consideration of the opinion of the Supreme Court, of its statement of facts (which we condense) and of its conclusions from those facts:

"Lake Angeline was situated on sections 10, 11, and 15, T. 47 N., R. 27 W., and was within the corporate limits of the city of Ishpeming, in Marquette County. It contained 148.61 acres within the government meander lines. It was a mile in length east and west, and 1690 feet in width on the centre line of section 10, which is its widest point.

* * * * * * * *

"The three parties to this litigation own all the lands surrounding this lake; the complainant owning that part of section 15 bordering upon the lake; the defendant Cleveland Iron Mining Company owning that part of sections 10 and 11 bordering on the lake east of the centre line of section 10; and the defendant Lake Superior Iron Company owning that part west of said centre line. These three mining corporations have owned this land about thirty years and have been engaged in mining upon their respective properties for more than twenty years. For the sake of brevity, these companies will be designated by their initial letters."

No ore was known to exist in the bed of the lake until the winter of 1886 and 1887, when it was discovered on territory not owned by plaintiff, but plaintiff was informed of the discovery. Afterwards ore was discovered on its territory. The extent and locality of the ore beds were not exactly known, and negotiations were entered into for pumping out the lake, and ended in a contract between the parties.

It recited the discovery of the ore and the necessity of pumping out the lake, in order to "economically mine such ore as lies under such portions of said bed as each of said parties is respectively entitled to."

It provided for the purchase of a pumping apparatus which one B. C. Howell had, and, in consideration of the "mutual considerations received each from each, the receipt of which is hereby respectively acknowledged."

The agreement then provided what proportion of the cost of

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the pumping apparatus and plant should be respectively borne by the parties both for its purchase and maintenance, and the expenses of the work. And it was found by the Supreme Court that the agreement was formally executed. The acknowledgment by plaintiff recited that it was done by its president and secretary, and also that it was done on behalf of the corporation.

The total cost of draining and keeping water out of the lake until January 1, 1897, was $76,488.38. "Of this the C. I. M. Co. paid $44,149.68; the L. S. I. Co. $17,147.18; and the complainant $7591.38. The water under the southeast arm of the lake was comparatively shallow. A vast body of mud was found in the bottom of the lake, and the two defendants incurred an expense, in attempting to remove it, of $20,227.53."

"After the execution of this contract, each party worked upon its own property as defined thereby. The complainant mined out all the valuable ore under the southeast arm, and afterwards filled its opening with the waste rock. The L. S. I. made explorations at considerable expense, and the C. M. I. Co. made the five drill holes above referred to from the complainant's mine, and ran a drift through the rock underneath the lake nearly to the south line of section 10, and, after reaching ore, ran drifts and cross cuts with a view to determining the value of the ore and ascertaining if there was sufficient to open and equip a mine. All this involved large expense.

"The section line was regarded as the line dividing these properties. Nails were driven in the timbers underground to indicate the line. In 1894 complainant made an innocent trespass north of the line, for which an amicable settlement was made. In 1896 the C. I. M. Co. trespassed upon complainant's property south of the line, and amicably settled for it. Maps were frequently exchanged with each other. Complainant asked and obtained permission from the C. I. M. Co. for the construction of a railroad track north of the section line, which was constructed and has ever since been in operation by complainant. On March 21, 1894, the C. I. M. Co. executed a lease to complainant, granting it the right to use land north of the section line for stock-pit grounds and the erection of temporary

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structures for mining purposes. Other acts also were done by the respective parties in recognition of the fact that the south line of section 10 was the boundary line as stated in the above agreement. This state of affairs continued until November, 1896, when complainant served a notice upon the defendants that it claimed title to certain lands north of the section line.

* * * * * * * *

"Complainant commenced mining on lots four and five in 1863. The hill was very near the shore of the lake, and complainant dumped its waste rock into the lake and filled in several acres north of the section line. Upon this made land north of the line it erected some buildings, the most of which it removed to the south of the line in 1887. Complainant filed its bill of complaint November 23, 1896."

Chief Justice Grant, delivering the opinion of the court, stated the theory of the plaintiff's bill to be—

"That the territory formerly covered by the waters of this lake should be divided among the shore owners in proportion to the amount of shore frontage owned by each; that such ownership extends to the center of the lake to be equitably established by the court; and that such territory should be partitioned by convergent lines drawn from the outside limit of each frontage to a convergent point called the equitable centre. To the bill is attached a map purporting to contain such equitable division."

And after stating in what apportionment of the bed of the lake this would result, stated the claims of the defendants as follows:

"(1) The patent under which the defendant, the Cleveland Iron Mining Company, claims title gave it title to the whole east half of section ten (10) to the south line thereof, and complainant is barred from objecting to this claim because it has treated a body of water covering a portion of that territory as of no value, and joined in the draining of the water as if the land was merely swampy ground valuable only when reclaimed and made dry land.

"(2) Because it has title by adverse possession for more than fifteen (15) years.

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"(3) Because the south section line of ten (10) was fixed as a boundary by agreement between the parties, that agreement being recognized and evidenced by the pumping contract and its written adjuncts, and was followed by continuous acts of recognition thereof and expenditures based thereon by both parties.

"(4) Because the pumping contract is an estoppel by deed against the complainant from now asserting title.

"(5) Because the complainant is estopped by matter *in pais* from asserting title to the land.

"(6) Because the complainant is estopped by its laches.

"(7) Because as a tenant of a portion of the premises in dispute complainant is estopped to deny defendant's title."

That of Lake Superior Iron Company as follows:

"1. That there has been a practical division of the lake bed between the parties; that contracts, explorations and mining operations have been carried on on the strength of such division for many years, in which large sums of money have been expended, without any certainty at the time of such expenditures that returns would be realized by the defendants therefrom, and that, by such division and long course of construction between the parties, the complainant is estopped to claim any portion of the lake bed lying north of the section line.

"2. That the pumping contract, executed by the several parties, under their corporate seals, and expressly providing that it shall be binding upon the successors and assigns of the several parties, making it a contract running with the land, amounts to a division of the lake bed by deed duly executed by the several parties.

"3. That the pumping contract is so entirely based upon the division of the lake bed above mentioned, and said division forms so essential a part of the contract, that, if such division be set aside or disregarded, the contract itself must fall; that in such case, not only is the agreement to continue the drainage of the lake at an end, but either party has a right to demand that the drainage of the lake must stop and the water allowed to rise to its original level—a result which, after all that has

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been done under the pumping contract, and in reliance upon it, would work great injustice to the defendants.

"4. That if the original division of the lake be disregarded and a new division must be made, such division must be made by the middle line or thread of the lake, in accordance with the common law rule for division of the bed of fresh water streams."

Commenting on the claims the learned Chief Justice said:

"The situation is anomalous and the books present no similar case. In March, 1892, the parties entered into an agreement to extinguish the lake by pumping out the water, leaving the territory dry ground. They agreed upon an apportionment of expense substantially according to the territory within the lines of the government survey. The lake no longer exists. Nearly five years after this suit is planted upon the theory that the lake exists, and that the court must make an equitable division from a common equitable centre. All the parties, however, seem to have discussed the question as of a lake actually in existence."

The difficulties of apportionment on plaintiff's theory were stated, and the opinion proceeded as follows:

"The above statement is sufficient to show the difficulty in making an equitable apportionment, and while nothing was said during the negotiations leading up to the agreement, or in the agreement itself, in regard to the difficulty, it may have had much to do in the minds of the officers and agents of the respective parties in fixing the terms of that agreement. That contract was a deliberate settlement of the boundary line between the lands of the three companies, and was so understood. It was of the utmost importance to these parties that the boundary line be settled beyond any possible doubt. Complainant had discovered a mine on its territory, south of the line, and extending under an arm of the lake. At that time it was the only one which it was known would be benefited by the removal of the water. No ore of sufficient value to mine had been found under the lake north of the line. After the removal of the water would come extensive and very expensive explorations to determine whether there existed under the bed of the

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lake ore worth mining. The contract, if valid, established the line beyond dispute.

"The first obstacle for the complainant to remove, before resorting to an equitable apportionment, is this contract, recognized as valid, and acted upon for nearly five years by all the parties. It attempts to do this by asserting that in making that contract it relied upon the case of *Clute* v. *Fisher*, 65 Mich. 48, as establishing the rule that the territory should be divided by the government lines, and that it rested upon that case as the established law until the decision of *Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.*, 102 Mich. 227, claiming that the latter overruled the former, and that in making that contract there was a mutual mistake which entitles it to the relief prayed. The former case was decided in January, 1887, and the latter in June, 1894."

The case of *Clute* v. *Fisher* was discussed, and disposing of the question raised upon the theory that plaintiff relied upon that case in its negotiations and contract with the defendant, and that all the parties so understood it, it was said:

"We will first discuss and dispose of the question raised upon the theory that complainant relied upon the decision of *Clute* v. *Fisher* as an authoritative enunciation of the law in its negotiations and contract with the defendants, and that all the parties so understood it. The following then is the situation: We find that the parties in reliance upon that case entered into a deliberate contract establishing their boundary lines and determining the amount of territory belonging to each. Complainant made the contract with knowledge that it gained territory south of the line, known to be valuable, while it surrendered territory north of the line, not then known to possess any value. All parties are chargeable with knowledge that each was to incur risks of its own, make its own expenditures upon its own land according to the agreement, and, by reason of its expenditures and improvements, would be placed in such a position that it could not be restored to its former *status quo*.

"The anticipated result came. The explorations, expenditures and improvements were made, each company making them at its own risk. It is impossible to restore the *status quo* or to

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render exact justice between the parties, because the data are not in existence. It is doubtful if a result approximately correct could be reached upon an accounting. It would be impossible to determine its correctness within many thousands of dollars.

"The result of complainant's contention would be that, whenever any case has been overruled, every transaction or agreement based upon that decision may be set aside by the courts, if not barred by the statute of limitations. The agreements and settlements of parties, made with full knowledge of the facts and in reliance upon the law, ought to be as binding as the judgment of the court in a particular case. If ten other similar suits had been pending when *Clute* v. *Fisher* was decided, and judgment had been rendered in reliance upon that decision, the courts could now set them aside. The law is not so unstable as to permit such results. Judgments rendered and contracts made upon the faith of the law as enunciated in the decision of the court, in the absence of fraud or misrepresentation, must stand. When the decision is overruled, the overruling decision controls only subsequent transactions. Such is the rule recognized by the decisions and text writers."

The opinion then proceeded to say that the mistake of plaintiff was one of law, and the case was "stripped of all other circumstances. It contains no element of misrepresentation, imposition, suppression, undue influence, undue confidence, imbecility or surprise. Neither said or did anything to mislead the other. Each acted with deliberation and with complete knowledge of all the facts. The sole basis of complainant's claim is that the decision of this court, upon the faith of which the contract was made, was subsequently overruled."

And it was decided that the case did not come "within any exception to the rule that a mistake of law does not furnish any ground for relief."

It was then considered if the contract settling the boundary line and acquiescence therein and the acts done thereunder estopped plaintiff from asserting a different line, and it was held that it did against the claim that the statute of frauds prevented estoppel — against the claim that a corporation could not settle

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a boundary line without a meeting and vote of its stockholders. "The contract was the act of the three parties to it," the court said,

"It was introduced by the complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of the corporation. Complainant, as well as the defendants, paid out large sums of money under it. All are now estopped to deny its due execution and validity.

* * * * * * * *

"Complainant is entirely without equity. It doubted the correctness of the rule of *Clute* v. *Fisher*, and thought that a different rule might sometime prevail. It was then its duty to take steps to test the question before permitting defendants to enter into a contract and explorations involving over $100,000. It should at least have informed the defendants of its claims, and given them the opportunity to make a contract with that in view.

"This claim would not have been heard of unless the C. I. M. Co. had developed a valuable mine. The fact that the venture proved successful after large expenditure creates no equity for this complainant. The skill, energy and money of that company developed a valuable property. It ought in justice to reap the benefit, and the complainant ought to be estopped to participate in the benefit, unless an unbending rule of law prevents. *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 592; *Clegg* v. *Edmondson*, 8 De G. M. &. G. 787.

"It would not have offered to bear its share of the loss if unsuccessful, nor could it have been compelled to.

"Furthermore, it was guilty of laches in keeping silence when it ought to have spoken. Everyone is presumed to know the law. Therefore, it must be presumed to have known of the law enunciated in *Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.* It had an able attorney, who keeps well versed in the decisions of the courts of this State. Yet it waited two years and a half before asserting its claim, and still nine months after obtaining the opinion of its attorney that *Clute* v. *Fisher* was no longer the law. It waited until

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circumstances and conditions have so changed that it is impossible to restore the *status quo*."

It is manifest that the Supreme Court rested its decision on the grounds (1) that the pumping contract was a settlement of boundaries between the contestants; (2) that what was done and expended under it worked an estoppel against the plaintiff; (3) laches of the plaintiff, in asserting its claim whereby the *status quo* could not be restored.

It requires no argument to demonstrate that neither of these grounds involves a Federal question. But plaintiff in error contends that they were all made to depend upon a Federal question, which the court erroneously decided, and therefore that they necessarily involve such question.

It is claimed to arise under conflicting claims under United States patents. "This," counsel for plaintiffs say, "presents the *fundamental Federal* questions [the italics are counsel's] involved in this case, viz.: Did the complainant acquire title to the centre of the lake by virtue of its ownership of said government lots 2, 3, 4 and 5; or did defendants obtain title by virtue of their several patents, to a point where the south line of section 10, if projected east and west through the water of the lake, would run?" And this asserted Federal question is said to have been decided by the Supreme Court of Michigan in the following language of its opinion: "The Cleveland Iron Mining Co. claimed title by virtue of the original patent. Complainant owned no specific piece of land north of the section line, even under its own theory, which could be measured by metes and bounds. How much, if any, it owned could only be determined by agreement or the decree of a court of equity."

What this language means we do not think the opinion of the court leaves in doubt. But whether plaintiff did or did not own land of section 10 which could be or could not be measured by metes and bounds; whatever its rights and the rights of the other parties were, they could be settled by agreement, and could be made the foundation of business transactions and enterprises. The Supreme Court determined they were so made and could be so made under the laws of Michigan.

But again, and whatever the error in that conclusion, (we do

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not assert there was any,) the court decided, as an independent ground of estoppel, that plaintiff was guilty of laches, and that was sufficient to sustain its judgment.

The case must, therefore, be dismissed for want of jurisdiction, and it is so ordered.

CORRALITOS COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 267. Submitted April 24, 1900. — Decided May 28, 1900.

The appellant herein filed its original petition in the Court of Claims against the United States and the Apache Indians on September 6, 1892. Subsequently and by leave of court an amended petition was filed March 2, 1894, from which it appears that the petitioner is a corporation chartered under the laws of the State of New York and doing business in the state of Chihuahua, county of Guleana, Republic of Mexico, and that property to the value of nearly seventy-five thousand dollars, belonging to the petitioner, and situated at the time in the Republic of Mexico, was taken therefrom in 1881 and 1882, and stolen and carried off by the Apache Indians, then in amity with the United States, and brought from the Republic of Mexico into the United States. By virtue of the act of Congress entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," approved March 3, 1891, judgment for the value of the property thus taken by the Indians was demanded. The United States filed a plea in bar, alleging that the claimant ought not to have and maintain its suit, "because the depredation complained of is alleged to have occurred in the Republic of Mexico, beyond the jurisdiction of the United States and the courts thereof, and that the court, therefore, had no jurisdiction to entertain this suit." The plaintiff demurred to the plea in bar as bad in substance. The Court of Claims overruled the demurrer, sustained the plea in bar, and dismissed the petition. *Held* that the judgment of the Court of Claims was right, and it must be affirmed.

THE appellant herein filed its original petition in the Court of Claims against the United States and the Apache Indians on September 6, 1892. Subsequently and by leave of court an amended petition was filed March 2, 1894, from which it ap-

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pears that the petitioner is a corporation chartered under the laws of the State of New York and doing business in the state of Chihuahua, county of Guleana, Republic of Mexico, and that property to the value of nearly seventy-five thousand dollars, belonging to the petitioner, and situated at the time in the Republic of Mexico, was taken therefrom in 1881 and 1882, and stolen and carried off by the Apache Indians, then in amity with the United States, and brought from the Republic of Mexico into the United States. By virtue of the act of Congress entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," approved March 3, 1891, c. 538, 26 Stat. 851, judgment for the value of the property thus taken by the Indians was demanded.

The United States filed a plea in bar, alleging that the claimant ought not to have and maintain its suit, "because the depredation complained of is alleged to have occurred in the Republic of Mexico, beyond the jurisdiction of the United States and the courts thereof, and that the court, therefore, had no jurisdiction to entertain this suit."

The plaintiff demurred to the plea in bar as bad in substance.

The Court of Claims overruled the demurrer, sustained the plea in bar, and dismissed the petition. 33 C. Cl. 342. The petitioner appealed from that judgment to this court.

Mr. John Critcher for appellant.

Mr. Assistant Attorney General Thompson and *Mr. Lincoln B. Smith* for appellees.

Mr. Justice Peckham, after stating the foregoing facts, delivered the opinion of the court.

The very satisfactory opinion of the Court of Claims in this case leaves little to be said by us in affirming the judgment of that court.

It would require very plain language from Congress by which to impose a liability on the part of the United States for the seizure or stealing by Indians of property belonging to a citizen

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of the United States, but situated at the time of such seizure or stealing within the confines and jurisdiction of a foreign sovereignty. Generally the government admits no liability for the destruction of the property of its citizens by third parties, even when it occurs within the limits of the United States. Still less reason would exist for the acknowledgment of any such liability for property of its citizens destroyed or stolen within the limits and under the jurisdiction of a foreign nation.

Upon proof of the existence of certain facts the United States, however, at an early day admitted an exceptional liability in favor of its citizens whose property within the United States had been destroyed by friendly Indians. By chapter 30 of the act of May 19, 1796, 1 Stat. 469, provision was made for a boundary line to be established between the United States and various Indian tribes, which was to be clearly ascertained and distinctly marked; and by section 14 of that act it was provided: "That if any Indian or Indians belonging to any tribe in amity with the United States shall come over or across the said boundary line, into any State or Territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States," then, in such case, it was made the duty of such citizen to make application to the superintendent, or such other person as the President of the United States should authorize for that purpose, who, being furnished with the necessary documents and proofs, and under the direction of the President, was to make application to the nation or tribe to which the Indian or Indians belonged for satisfaction, and provision was made for obtaining the same, if possible.

The section contained a provision that "In the meantime, in respect to the property so taken, stolen or destroyed, the United States guarantee to the party injured an eventual indemnification."

No particular method was provided for obtaining such indemnification, and it rested with Congress when and how to make it.

The property mentioned in this section, it will be seen, is

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property in any State or Territory of the United States, and it must have been stolen or destroyed by Indians belonging to a tribe in amity with the United States, who had come over, or across, the boundary line mentioned in the first section of the statute. The language of the statute is plainly confined to the destruction or stealing of property situated at the time within a State or Territory of the United States. The statute acknowledges and provides for no responsibility or liability for property of citizens of the United States situated within the domain of a foreign State at the time of its seizure or destruction.

By the act approved March 30, 1802, c. 13, 2 Stat. 139, a boundary line was again established between the United States and various Indian tribes, and the fourteenth section of that act again provided for an eventual indemnification by the United States for property lost under the same conditions as were stated in the act of 1796, and no liability was acknowledged, or provided, for any loss or destruction of property outside and beyond the jurisdiction of the United States.

Although there was, subsequent to the act of 1802, frequent legislation by Congress upon the subject of trading with the Indians, yet the liability of the government for property stolen or destroyed remained the same.

No change in regard to such liability was made by the act approved June 30, 1834, c. 161, 4 Stat. 729. Section 17 of that statute provided that: "If any Indian or Indians, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal or destroy" certain property, substantially the same proceedings as in the former statutes should be taken against the tribe to which the Indians belonged, for recovering the value of the property so taken, and the United States guaranteed eventual indemnification to the citizen whose property was taken, the same as in the former statutes. The "Indian country" mentioned in the act included the country contained within the boundary lines mentioned in

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the preceding acts, above referred to. The liability of the government for property was still limited, by the act of 1834, to that taken or destroyed in the Indian country, or in a State or Territory of the United States.

By section 8 of the act approved February 28, 1859, making appropriations for the expenses of the Indian department, so much of the act of 1834 as provided that the United States should make indemnification out of the Treasury for property taken or destroyed in certain cases by Indians trespassing on white men, was repealed, thus taking away the obligation of the government to eventually indemnify the citizen for property taken by the Indians, as provided in the former statutes.

By a general resolution, approved June 25, 1860, 12 Stat. 120, the repeal of the indemnity provision by the act of 1859 above mentioned was directed to be so construed as not "to destroy or impair any indemnity which existed at the date of said repeal." Citizens whose property had been taken or destroyed under the circumstances provided for in the statute of 1834 had generally been paid by deducting the value of the property destroyed from annuities due the respective tribes, without any specific appropriation having been made therefor, though there were some acts passed prior to 1859 for the payment of such claims out of the Treasury of the United States.

These various acts are referred to and a history of the legislation upon the subject of claims for Indian depredations is given in the opinion delivered in the Court of Claims in the case of *Leighton* v. *United States*, 29 C. Cl. 288.

It is evident from the legislation enacted that claims for Indian depredations had prior to 1872 become quite frequent. By section 7 of the Indian appropriation act, approved May 29, 1872, 17 Stat. 165, 190, it was provided that the Secretary of the Interior should prepare and cause to be published such rules and regulations as he deemed necessary to prescribe the manner of presenting claims "arising under existing laws or treaty stipulations, for compensation for depredations committed by the Indians, and the degree and character of the evidence necessary to support such claims." By existing laws or treaty stipulations there was no pretence of any obligation of the govern-

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ment to guarantee the eventual payment for property destroyed or stolen beyond the limits of the United States. It was further provided in the act of 1872 that the Secretary should carefully investigate such claims as might be presented, subject to the rules and regulations prepared by him, and report to Congress at each session the nature, character and amount of such claims, whether allowed by him or not, and the evidence upon which his action was based, and it was provided that no payment on account of any claim should be made without a specific appropriation therefor by Congress.

It will be seen that the claims which the Secretary of the Interior was authorized to investigate were claims "arising under existing laws or treaty stipulations." That act did not enlarge the character of the responsibility of the government beyond what it was prior to its passage.

By the Indian appropriation act, approved March 3, 1885, 23 Stat. 362, 376, an appropriation was made for the investigation of certain Indian depredation claims, which, it is obvious, were claims of the description included in the former statutes upon the subject, and the appropriation was plainly not meant to provide for the investigation of claims for property destroyed outside the limits of the United States.

Pursuant to the provisions in these appropriation acts, it seems that the Secretary of the Interior had caused to be examined and allowed numerous claims for the loss or destruction of property by Indians, and had reported the same to Congress, but Congress had made no appropriation to pay them. In addition to the claims thus approved by the Secretary of the Interior and reported to Congress, it is said that a still greater number were pending in the department for investigation, and in this state of affairs Congress passed the act of 1891, 26 Stat. 851, providing as follows:

"That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

"First. All claims for property of citizens of the United States

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taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

"Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, and for other purposes, approved March 3, 1885, and under subsequent acts, subject, however, to the limitations hereinafter provided."

Here, for the first time, jurisdiction is conferred upon a court to inquire into and finally adjudicate in regard to the validity of claims against the government arising out of Indian depredations, as described in this act. Up to the time of its passage, and since the passage of the act of 1872, claimants had been compelled to rely for compensation for losses so incurred upon a special application to Congress, made in each case to that body directly or through the Secretary of the Interior.

The purpose of Congress in enacting the statute of 1891 undoubtedly was to provide thenceforth a judicial tribunal for the hearing of such claims and for their payment in accordance with the judgment of the court. It is true that the language of the provision in the act of 1891, which confers jurisdiction upon the Court of Claims, differs somewhat from that used in the various prior statutes, which had guaranteed the eventual indemnification of the claimant by the government, but such difference is not in our judgment at all significant of an intention to enlarge the liability of the government to a greater extent than had ever before been recognized.

Considering the prior legislation of Congress in regard to claims for Indian depredations, none of which recognized any liability of the nature of the claim now made, is it reasonably possible for us to say that Congress intended by the act of 1891 to increase the liability of the government, and to extend it to property destroyed within the limits and jurisdiction of a foreign

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state, when it has failed to use any language to plainly signify so extraordinary a departure from its past policy? Up to 1891 there is not the slightest ground for asserting that any such obligation had ever been acknowledged on the part of Congress in any legislation enacted by that body. Up to that time it had always confined the liability of the government, in any event, to a claim for the stealing or destruction of property within the limits of the United States, and we think that if any such radical and material departure from the policy of the government from its foundation had been intended by the act of 1891, plain language to accomplish such a change would have been found in that act. We look in vain for any such language.

Instead of enlarging its liability beyond that which it provided for in the earlier statutes, we find that in 1859 Congress repealed the law by which the government became a guarantor for eventual indemnification to the owner for property destroyed by Indians. The act of 1891 again altered that liability, and provided for the rendition of judgment against the government for the value of the property taken or destroyed, and also against the tribe of Indians committing the wrong, if it were possible to identify such tribe, and the judgment in that case was to be deducted from the annuities due the tribe from the United States, as provided in the sixth section, and if payment could not be procured from the tribe, then the amount of the judgment was to be paid from the Treasury of the United States, which payment was to remain a charge against the tribe, and was to be deducted from any annuity fund or appropriation which might thereafter become due from the United States to such tribe.

By this act of 1891, the obligation of the United States as a substantial guarantor is again acknowledged, notwithstanding the act of 1859; but it is acknowledged in the plain language contained in the sixth section, which provides a means of payment of the judgment obtained pursuant to the provisions of the act. Correspondingly plain language would have been used in this act had it been intended to enlarge the general scope of the liability of the government so as to include Indian depredations committed within the borders of a foreign State.

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A decision of the question of what would be the nature of an action like this, if between private individuals, whether transitory or not, would give us no aid in determining the meaning of this act of Congress. The jurisdiction of the court depends wholly upon the act, and we must construe its meaning from the language used in connection with the previous legislation on the subject. In so construing the act we have no doubt that it does not include claims for property destroyed or stolen within the limits of a foreign country.

It was said by the Court of Claims, in the opinion delivered in this case, as follows:

"The United States (unless for some express agreement between the two nations) may not discipline or control Indian tribes within the Mexican territory, and, being without power to enter that territory in time of peace without Mexico's consent, is without direct responsibility for what may there occur. Wrongs sustained by a citizen of the United States while in Mexico can only be remedied through the executive branch of the government, and do not present causes of action in the courts. If citizens of the United States resort to Mexico, they may expect, and their government may demand for them, equality of safety and protection with the citizens of that country, an unbiased administration of the laws in relation to them and their property, and any special advantages (if such there happen to be) expressly reserved by treaty. Beyond this there is no right.

"It is not alleged that this plaintiff was subjected to any loss other than that which occurred at the hands of Indians within the territorial jurisdiction of Mexico; to remedy that loss he must resort to the Mexican courts, if the law of that republic happen to provide a remedy through its judiciary for such misfortunes. Failing that, an appeal might possibly be made upon the Mexican government through the executive department of the government of the United States, if the facts so authorize and that department deem such an appeal advisable and wise. In any event, the matter in dispute does not fall within the jurisdiction of this court."

For these reasons, among others, the court came to the conclusion that Congress did not intend by the act of 1891 to en-

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Statement of the Case.

large the liability of the government so as to include property destroyed or stolen in foreign territory.

We agree with the results arrived at by the Court of Claims, and think it unnecessary to add to what has been so well said by that court.

The judgment is right, and must be

Affirmed.

SULLY v. AMERICAN NATIONAL BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 266. Argued April 26, 1900. — Decided May 28, 1900.

Bills were filed in Tennessee by the American National Bank and others against the Carnegie Land Company, a Virginia corporation, doing business in Tennessee under the provisions of the act which was under review in *Blake* v. *McClung*, 172 U. S. 239; 176 U. S. 59; and also against various creditors of that company. The prayer of the bill was that it might be taken as a general creditors' bill; and it was alleged that the company was insolvent, having a large amount of property in the State which it had assigned for the benefit of its creditors, without preferences, which was in disregard of the statute of the State, that a receiver should be appointed, the assets marshaled and the creditors paid according to law. The company answered denying that it was insolvent, and claimed that the assignment should be held valid, and the trust administered by the assignees. During the pendency of the suit, Sully and Carhart, New York creditors, filed a bill, setting up that nearly all the assets, if not all of them, in the hands of the assignee of the company, and sought to be impounded by the bill filed by the bank, were covered and conveyed to Sully, as trustee, and that Carhart was entitled to priority over all other creditors of the defendant in the appropriation of the assets covered by the deed of trust to Sully. They asked for leave to file that bill as a general bill against the land company, or, if that could not be done, that they might file it in the case of the bank against the land company, as a petition in the nature of a cross-bill against that company. Other proceedings took place which are set forth in detail in the statement of the case. They ended in the consolidation of the various proceedings into one action and a reference to a master to take proof of all the facts. The master made his report, upon which a final decree was entered. It was decreed that the land company, by its

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deed of general assignment, of June 3, 1893, in making disposition therein for the payment of its creditors, without any preferences, attempted to defeat the preferences given by law to creditors, residents of Tennessee, over non-resident creditors and mortgagees, whose mortgages were made subsequent to the creation of the debts due resident creditors, and that such deed was fraudulent in law, and void; that the making of the deed was an act of insolvency by the land company, and that the bill filed by the bank was properly filed, and should be sustained as a general creditors' bill, and that the assets of the company under the jurisdiction of the court were subject to distribution under the law relating to foreign corporations doing business in Tennessee, and as such should be decreed in the action then pending. The decree further adjudged that Carhart was a *bona fide* holder of the bonds mentioned in his bill, and that he was entitled to recover thereon as provided for in the decree, but subject to the payment of debts due residents of Tennessee prior to the registration of such mortgage. It was also decreed that the Travelers' Insurance Company by its mortgage acquired a valid lien upon the property covered by it, subordinate, however, to debts due residents of Tennessee contracted prior to the registration thereof, and also subject to some other liabilities of the land company. The case was taken to the Court of Chancery Appeals, which modified in some particulars the decree of the chancellor, and after such modification it was affirmed. Upon writ of error from the Supreme Court the case was there heard, and that court held that the statute in question, providing for the distribution of assets of foreign corporations doing business in that State, was constitutional, and was not in contravention of any provision of the constitution of the United States. The decree of the Court of Appeals was, after modifying it in some respects, affirmed. The case was then brought here on writ of error. *Held:*

(1) That on an appeal from a state court the plaintiff in error in this court must show that he himself raised the question in the state court which he argues here, and it will not aid him to show that some one else has raised it in the state court, while he failed to do so; but if he raised it in the Supreme Court of the State, it is sufficient;

(2) That the allegation in Carhart's case that he was a resident of New York is a sufficient allegation of citizenship, no question having been made on that point in the courts below;

(3) That a Tennessee general creditor has the same right of preference as against a resident mortgagee that he has against a non-resident, and the same burden that is placed upon non-resident mortgagees and judgment creditors is by the statute placed upon resident mortgagees and judgment creditors;

(4) That there is no foundation for the claim made, on behalf of Carhart, that section 5 of the Tennessee act of 1877 violates section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the non-resident mortgagee of his property

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without due process of law; but, on the contrary, the question has been decided the other way in *Blake* v. *McClung;*

(5) That there has been no denial by the State of Tennessee of the equal protection of the laws to any person within its jurisdiction.

THE contest in this case arises out of the insolvency of the Carnegie Land Company, a Virginia corporation, doing business at the time of its insolvency in the State of Tennessee under the provisions of the act of the legislature of that State passed in 1877, and which was under review in this court in *Blake* v. *McClung*, 172 U. S. 239; 176 U. S. 59.

The contest is between creditors of the company above named, who are non-residents of the State of Tennessee, both those who are unsecured as well as those who are secured by mortgages upon the property of the company in that State, and creditors of such company who are residents of the State.

The questions to be decided arise out of the provisions of the fifth section of the above mentioned act, the material portion of which reads as follows:

"SEC. 5. That the corporations, and the property of all corporations coming under the provisions of this act, shall be liable for all the debts, liabilities and engagements of the said corporations, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements and contracts. Nevertheless, creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition." Acts of Tennessee, 1877, March 21, c. 31, p. 44.

On November 27, 1893, the American National Bank and

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others filed their bill against the Carnegie Land Company and various named creditors of that company, and prayed that the bill might be taken as a general creditors' bill against the company on behalf of the complainants and of all the other creditors of the company, and that those named as creditor defendants might represent the class, their number being too great to make them all parties to the bill. The complainants alleged that they were creditors of the land company; that the company was insolvent; that it had a large amount of property in the State; that it had assigned the same for the benefit of its creditors without giving preferences, which was in disregard of the statute of the State, (above referred to,) and asked that the creditors of the company should prove their claims in that suit; that a receiver should be appointed, the assets marshaled and the creditors paid according to law.

To this bill the land company made answer, denying its insolvency, or that it had ceased to do business, or had abandoned its franchises, and claimed that its assignment was good and valid, and that the trust should not be taken out of the hands of its assignee.

During the pendency of this suit Wilberforce Sully and A. B. Carhart, residents of the State of New York, filed a bill against the land company and certain corporations in the State of Connecticut, called the Travelers' Insurance Company and the Connecticut Trust & Safety Deposit Company. The complainants alleged that the Carnegie Land Company had duly determined to issue three hundred thousand dollars worth of bonds, secured by mortgage upon its property in the State of Tennessee, and of that amount of bonds but eighty-five thousand dollars had actually been issued; that Sully was the mortgagee in trust in the mortgage executed by the company for securing the payment of the bonds, and that Carhart was the *bona fide* holder of all of the eighty-five thousand dollars of such bonds; that the mortgage was executed on January 2, 1893, and was duly registered in the office of the register of Washington County, Tennessee, on February 10, 1893; that the interest had not been paid as it became due, and that by virtue of a provision of the mortgage the whole principal sum had become due and

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payable, and that the land company was in default in the payment of the principal and interest due on such bonds. The bill alleged the commencement of the suit already spoken of, brought by the American National Bank and others against the land company, and it alleged that nearly all of the assets, if not all of them, in the hands of the assignee of the company, and sought to be impounded by the bill filed by the American National Bank, were covered and conveyed to the complainant Sully, as trustee, and that the complainant Carhart, the holder of the outstanding bonds, was entitled to priority over all other creditors of the defendant in the appropriation of the assets covered by the deed of trust executed to Sully, as above stated. Complainants prayed that they might be allowed to file this bill as a general bill against the land company, or if for any reason this could not be done, that they should be allowed to file the same in the above cause of the bank against the land company and others as a petition in the nature of a cross-bill against the said company.

To this bill the complainants in the first bill, the American National Bank and others, made answer, and denied that the land company had ever executed any mortgage or that any bonds were ever issued under any mortgage, and denied that the land company ever in any way or manner, either in law or in fact, authorized the issuing of any bonds under such mortgage, or to be secured thereby, and they denied that any such bonds constituted any binding obligation as against the land company.

The bank also alleged that if the bonds to the extent of eighty-five thousand dollars had in fact been issued, yet still the debts sued on by the bank and its co-plaintiffs in the first bill above mentioned were contracted by the land company, and were incurred long before the execution and registration of the mortgage securing such bonds, and therefore they claimed that the debts owing to citizens and residents of Tennessee prior to the execution and registration of the mortgage, above mentioned, should have priority under the law over any debts secured or pretended to be secured by the mortgage.

The Travelers' Insurance Company and the Connecticut Trust

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& Safety Deposit Company also filed an answer to the bill of Sully and Carhart, in which the Travelers' company alleged that the land company was indebted to it in the sum of $30,000, and three years' interest, and in other sums amounting to several thousand dollars, which amount was secured by a mortgage or deed of trust to the Connecticut Trust and Safety Deposit Company on what is known as the Carnegie Hotel property, which is a portion of the property of the land company, and is situated in the State of Tennessee. It also denied the existence of the bonded indebtedness claimed on the part of complainants, and alleged that in any event the debt of the Travelers' company against the land company was older than, and the mortgage to the Trust Company was prior to, that of the complainants Sully and Carhart, and it denied that these last-named parties had any debt as claimed by them or a lien of any kind on the property of the land company.

The insurance company also filed a petition in the suit brought by the bank, in which it set up the existence of its mortgage, and also prayed to be allowed to become a party to that cause, and to have its note, which was secured by the mortgage, declared a preferred claim, and decreed to be paid in full out of the proceeds of the sale of the property specifically mortgaged to it.

An amended petition was filed by it, in which it alleged that it was the owner of another claim against the land company in favor of P. Fleming & Company, for a little less than two thousand dollars, under the circumstances mentioned in the petition.

October 11, 1895, Mary P. Myton and A. B. Carhart filed a petition in each of the above suits, in which they described themselves as Mary P. Myton, a resident of the State of New York, and A. B. Carhart, a resident of the city of Brooklyn. In that petition Mary P. Myton alleged a claim against the land company, as existing on November 27, 1894, in the sum of $4094.54, with interest from November 27, 1892; while A. B. Carhart alleged a claim as of the date of November 27, 1894, of $2248.66, and they asked to become parties to the above named causes,

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Counsel for Plaintiff in Error.

for the purpose of setting up these demands, and for a decree against the company for their amounts, with interest.

(It is stated that the two debts represented by these notes were actually in existence prior to the execution of the mortgage to secure the bonds owned by Carhart; the notes being, in truth, renewals of other ones executed prior to that time.)

These various proceedings were consolidated into one action, and the case was referred to a master to take proof of all the facts. The master made his report, upon which a final decree by the chancellor was entered. It was decreed that the land company, by its deed of general assignment, of June 3, 1893, in making disposition therein for the payment of its creditors, without any preferences, attempted to defeat the preferences given by law to creditors, residents of Tennessee, over non-resident creditors and mortgagees, whose mortgages were made subsequent to the creation of the debts due resident creditors, and that such deed was fraudulent in law, and void; that the making of the deed was an act of insolvency by the land company, and that the bill filed by the bank was properly filed, and should be sustained as a general creditors' bill, and that the assets of the company under the jurisdiction of the court were subject to distribution under the law relating to foreign corporations doing business in Tennessee, and as such should be decreed in the action then pending.

The decree further adjudged that Carhart was a *bona fide* holder of the bonds mentioned in his bill, and that he was entitled to recover thereon as provided for in the decree, but subject to the payment of debts due residents of Tennessee prior to the registration of such mortgage. It was also decreed that the Travelers' Insurance Company by its mortgage acquired a valid lien upon the property covered by it, subordinate however to debts due residents of Tennessee contracted prior to the registration thereof, and also subject to some other liabilities of the land company.

The case was taken to the Court of Chancery Appeals, which modified in some particulars the decree of the chancellor, and after such modification it was affirmed. Upon writ of error from the Supreme Court the case was there heard, and that

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court held that the statute in question, providing for the distribution of assets of foreign corporations doing business in that State, was constitutional, and was not in contravention of any provision of the Constitution of the United States. The decree of the Court of Chancery Appeals was modified in some respects, and after modification it was affirmed, and the cause remanded to the chancery court for execution.

The case has been brought here on writ of error in behalf of certain unsecured creditors, non-residents of Tennessee, and also in behalf of the Travelers' Insurance Company and of the holder of the bonds issued by the land company.

Mr. T. S. Webb and *Mr. R. E. L. Mountcastle* for plaintiffs in error. *Mr. Quincy Ward Boese* was on their brief.

Mr. S. C. Williams and *Mr. E. J. Baxter* for defendants in error. *Mr. John H. Bowman* was on *Mr. Williams'* brief.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court.

There are two classes of creditors before the court, both of whom insist upon the erroneous character of the decree of the Supreme Court of the State. They are (*a*) general unsecured and non-resident creditors, and (*b*) non-resident creditors, who are also mortgagees. The creditors suing out this writ of error are all non-residents of the State of Tennessee, and they claim to have been illegally discriminated against in the courts below by reason of the statute of Tennessee providing for preferences to Tennessee creditors.

In regard to the unsecured non-resident creditors, objection is first made that there is only one of them, A. B. Carhart, who can be heard upon the question of the validity of the act of 1877, because he is the only person who has raised the point in any of the state courts. It is also claimed that the question was raised too late even by Carhart himself, inasmuch as it is alleged to have been raised by him for the first time in the Supreme Court of the State.

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In reply to the first objection, it is urged on the part of creditors, other than Carhart, that they are general creditors in like class with him, and that if he can raise the question they are entitled to participate with him in the benefits of a decision thereof in his favor, to the same extent as if they had each personally raised the same question in the state court.

Cases are cited by counsel for these creditors from the courts of Tennessee, in which they say it has been held that "a broad appeal by any one party from an entire chancery decree, where the matter is purely of equitable cognizance, carries up the whole case so as to allow relief to be granted to those who do not appeal;" and it is said that Carhart made a broad appeal.

In reply, counsel for defendants in error say that the rule in Tennessee is that an appeal by an antagonistic party, even though a broad one, will not avail his opponent. It is also argued that the other creditors cannot be heard under Carhart's appeal, because the interests of such other creditors are not joint or common with him, but they are simply interested in the same question, which has never been held sufficient.

However it may be in regard to the rights of parties on appeal in the state court, we think that in order to be heard in this court the question must have been raised in the state court by the individual who seeks to have it reviewed here. A plaintiff in error in this court must show that he has himself raised the question in the state court which he argues here, and it will not aid him to show that some one else has raised it in the state court, while he failed himself to do so.

The two plaintiffs in error here, Sully, as the assignee of Manning, and Mrs. Myton, failed to appeal from the decree of the chancellor, as well as from the decree of the Court of Chancery Appeals, nor did they except to the report of the master, nor to the decree affirming it, and their first mention of the point in their own behalf is after the decision of the state Supreme Court.

This is not a case where, by the reversal of a decree at the instance of those who particularly raised the question in the courts below, the whole decree is opened and nullified so as to necessarily let in all parties standing in the same position to

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share in the benefits of the decision. The fund is to be distributed in this case according to the decision of the court; and of the parties to this suit, those only can avail themselves of the benefits of the decree who have properly raised the question and in whose favor the decree is rendered.

We must hold, therefore, that neither Sully, as assignee of Manning, nor Mrs. Myton is in a position to raise the question of the invalidity of the state statute.

In regard to the objection that even Carhart has raised the question too late we think it is without foundation. He raised it in the Supreme Court, and that court decided it against him, not on the ground that he had not raised it in the lower court, but on its merits, and for the reason that in the judgment of the Supreme Court the statute was a valid and constitutional exercise of the legislative powers of the State.

The further objection made to Carhart is that it does not appear that he is a citizen of another State than Tennessee, and hence cannot avail himself of the fact of such citizenship in order to claim that his rights as such citizen have been infringed within the meaning of section 2 of article IV of the Constitution, declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. We think the objection untenable.

In his original bill to foreclose the mortgage securing the eighty-five thousand dollars of bonds held by him, he described himself as a resident of the State of New York, and in the petition of Mrs. Myton and Mr. Carhart, filed October 11, 1895, in the two cases of the bank against the land company, and Sully, trustee, against the land company, Mrs. Myton is described as a resident of the State of New York, and A. B. Carhart is described as a resident of the city of Brooklyn. No question seems to have been made throughout the litigation as to the citizenship of those parties. The question does not seem to have arisen in any stage of the case up to the argument in this court. Although there may be some slight difference in the facts between this case and those which are stated in *Blake* v. *McClung*, *supra*, at page 246, we yet think that Carhart brings himself within the principle decided in that case, and that his citizen-

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ship in the State of New York should be regarded as sufficiently proved.

Being entitled to raise the question, we must hold, in conformity to our decision in the *Blake case*, that Carhart, as an unsecured creditor and a citizen of New York, is entitled to share in the distribution of the assets of the Carnegie Land Company upon the same level as like creditors of the company residents of the State of Tennessee, and as the decree denies him that right, it must be reversed for that reason.

The next question arises out of the mortgage given as security for the payment of the bonds of the land company, of which Carhart held all that had been issued—$85,000.

Part of the fifth section of the act of 1877 provides—

"Nevertheless, creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by said corporation previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments."

Under this provision of the section, creditors of the land company residing in Tennessee, whose debts accrued prior to the filing and registration of the Sully, trustee, mortgage were by the decree of the court below preferred in payment over the mortgagee. By reason of such preference Carhart did not receive what he would have received, but for the preference so given. He claims that this preference in favor of resident creditors, whose debts existed when his mortgage was registered, is an illegal discrimination against him as a non-resident mortgagee, because the statute, as he says, while directing such a discrimination against a non-resident mortgagee, does not permit it as against a resident mortgagee. Such a discrimination, if it existed, is invalid within the decision of *Blake* v. *McClung*, *supra*.

It is objected, however, on the part of the defendants in error, that this is a merely abstract or moot question, because

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there are no resident mortgagees, and their rights have not, therefore, been determined. The objection is not well taken. Although there are no resident mortgagees in this case, yet the decree of the court below, following the statute, has postponed the payment of the mortgage, in favor of resident creditors whose debts accrued prior to the registration of that mortgage. If the statute does not permit such postponement against a resident mortgagee, then the postponement in the case of a non-resident mortgagee would be invalid. The postponement has in fact been made as against the non-resident mortgagee, and whether that postponement was legal and valid is no mere abstraction, because by reason thereof this non-resident mortgagee has actually suffered a loss in the payment of his mortgage. It is, therefore, entirely immaterial whether in this particular case there are or are not resident mortgagees. We are in this case necessarily brought to a decision of the question, whether the postponement was valid, and that depends upon the question, whether the act permits a similar postponement in the case of a resident mortgagee? If it does, it is conceded that the act is valid, so far as this particular question is concerned.

For us to hold that such postponement is not permitted in the case of a resident mortgagee is to condemn the statute on that point as a violation of the Constitution of the United States. Such a construction should not be adopted if the statute is reasonably susceptible of another which renders it valid. That rule applies, even though on some other point the statute has been already held to be a violation of the Federal Constitution.

We think the true construction of the statute requires us to hold that the resident owner of a mortgage would be postponed in its payment in favor of those debts made or owing by the corporation prior to the filing and registration of his mortgage. In other words, that the Tennessee general creditor has the same right of preference as against a resident mortgagee that he has against a non-resident, and the same burden that is placed upon non-resident mortgagees and judgment creditors is by the statute placed upon resident mortgagees and judgment

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creditors. We do not think that this construction leads to any absurd result.

It is urged that if it were to be so construed, a Tennessee creditor who had no mortgage or judgment would share with all other unsecured Tennessee creditors in the assets of the insolvent company, but that if he, being such creditor, took a judgment or mortgage as a security for the payment of his debt, he would thereby lose his right to share with the other resident non-secured creditors, and the latter would have a preferred right of payment over him for all debts of the company existing at the time of the registration of the mortgage. The creditor, it is said, would thus lose his right as a general creditor, and he would obtain no lien by his mortgage or judgment as against those creditors of whom he was one before he took his mortgage.

We agree that a construction which leads to such a result would be absurd, but such a result does not follow from our construction of the statute. When the Tennessee creditor takes his mortgage or recovers his judgment to secure an existing indebtedness, a new debt is not thereby created, but he has simply received, or obtained, a security for its payment, and a preference as against all other creditors whose debts may accrue subsequently to the filing and registration of his mortgage or the recovery of his judgment. He gains no priority over existing creditors of his class by taking a mortgage or judgment. The debts existing at that time, including his own, are to be paid, and it is only against debts subsequently incurred that the mortgage, or the judgment, has a preferential lien. If the debt for which he took the mortgage existed prior to the execution thereof, the mortgagee did not, by taking his mortgage, lose his right to share with the other unsecured creditors, but he did not acquire the right to assert the lien of his mortgage in preference to and against those creditors whose debts existed at the time of its registration. His rights as a general creditor of the land company, existing prior to the registration of the mortgage, were not in any manner lost or affected by the mortgage. He cannot assert the lien of his mortgage against prior creditors, but he does not lose his own right as a prior creditor

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by taking the mortgage. Although the act was evidently passed for the purpose of awarding certain preferences to Tennessee over foreign creditors, yet we see nothing in its general purpose which requires us to consider the act as making a distinction in favor of a Tennessee mortgagee as against a non-resident mortgagee.

While the effect of this construction deprives both classes of mortgagees, in case of insolvency of the mortgagor, of any benefit from their mortgages as against resident non-secured creditors, existing when the mortgages were registered, yet, at the same time, it permits such mortgagees to share in the distribution of assets with such unsecured creditors, provided their own debts existed prior to the taking of the mortgage, and did not spring into existence simultaneously with the mortgage.

The rights of Carhart as a secured creditor must be adjusted with reference to these views. If his secured debt, or any portion thereof, did, in fact, exist prior to his mortgage, he is entitled to share with other unsecured creditors, who are residents of the State of Tennessee.

Plaintiff in error Carhart also insists that section 5 of the act of 1877 violates section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the non-resident mortgagee of his property without due process of law.

We are unable to perceive any foundation for the claim, and we think the question has been already so decided in *Blake* v. *McClung*, which we have so frequently referred to. It was stated in that case, at page 260:

"It does not follow that, within the meaning of that amendment, (XIV,) the judgment below deprived the Virginia corporation of property without due process of law simply because its claim was subordinated to the claims of the Tennessee creditors. That corporation was not, in any legal sense, deprived of its claim, nor was its right to reach the assets of the British corporation in other States or countries disputed. It was only denied the right to participate upon terms of equality with Tennessee creditors in the distribution of particular assets of another corporation doing business in that State. It had notice of the proceedings in the state court, became a party to those

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proceedings, and the rights asserted by it were adjudicated. If the Virginia corporation cannot invoke the protection of the second section of article IV of the Constitution of the United States relating to the privileges and immunities of citizens in the several States, as its co-plaintiffs in error have done, it is because it is not a citizen within the meaning of that section; and if the state court erred in its decree in reference to that corporation the latter cannot be said to have been thereby *deprived* of its property without due process of law within the meaning of the Constitution."

That language fits this case. The principle is not altered by the fact that in this case the creditor had a mortgage which was postponed, while in the case cited his debt was unsecured, but it was also postponed to the Tennessee creditor.

Nor can we see that there has been any denial by the State of Tennessee to any person within its jurisdiction of the equal protection of the laws. Upon this point also we refer to the same case of *Blake* v. *McClung*, where, at page 260, the question is decided.

These two last points would apply also to the mortgage of the Travelers' Insurance Company. That company being a corporation of the State of Connecticut could not raise the question of a denial of any privilege or immunity as such citizen, under the provision of section 2, article IV, of the Constitution. *Blake* v. *McClung*, *supra*. But the questions as to the deprivation of property without due process of law and of being denied the equal protection of the laws are raised by that corporation, and must be decided in a way similar to the case of Carhart.

With the exception of Carhart as a non-resident unsecured creditor, we do not see that the plaintiffs in error herein have any right to complain of the decree of the Supreme Court of Tennessee, but as such non-resident unsecured creditor he has the right to share in the distribution of the assets of the Carnegie Land Company upon the same level as like creditors of the company who are residents of the State of Tennessee, and as the decree below denies him that right, it must be reversed as to him for that reason, and the case remanded to the Supreme

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Court of the State for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE BREWER and MR. JUSTICE WHITE did not hear the argument and took no part in the decision of this case.

FITZPATRICK *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

Submitted April 30, 1900. — Decided May 28, 1900.

Under the Court of Appeals Act of March 3, 1891, a conviction for murder is a "conviction of a capital crime," though the jury qualify their verdict of guilty by adding the words "without capital punishment." The test of a capital crime is not the punishment which is imposed, but that which may be imposed under the statute.

Under the statute of Oregon requiring the offence to be stated "in ordinary and concise language and in such manner as to enable a person of common understanding to know what was intended," an indictment for murder charging that the defendant feloniously, purposely, and of deliberate and premeditated malice inflicted upon the deceased a mortal wound of which he instantly died is a sufficient allegation of premeditated and deliberate malice in killing him.

Evidence that one jointly indicted with the defendant was found to have been wounded in the shoulder, and his accompanying statement that he had been shot, were held to be competent upon the trial of the defendant.

Any fact which had a bearing upon the question of defendant's guilt immediate or remote and occurring at any time before the incident was closed, was held proper for the consideration of the jury, although statements made by other defendants in his absence implicating him with the murder would not be competent.

The prisoner taking the stand in his own behalf and swearing to an alibi was held to have been properly cross-examined as to the clothing worn by him on the night of the murder, his acquaintance with the others jointly indicted with him, and other facts showing his connection with them.

Where an accused party waives his constitutional privilege of silence and takes the stand in his own behalf and makes his own statement, the prosecution has a right to cross-examine him upon such statement with

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Statement of the Case.

the same latitude as would be exercised in the case of an ordinary witness as to the circumstances connecting him with the alleged crime.

Evidence in rebuttal with respect to the effect of light from the flash of a revolver was held to be competent where the defence put in a calendar, apparently for the purpose of showing the time the moon rose that night.

THIS was a writ of error to review the conviction of Fitzpatrick, who was jointly indicted with Henry Brooks and William Corbett for the murder of Samuel Roberts, on March 13, 1898, at Dyea, in the Territory of Alaska.

The indictment, omitting the formal parts, was as follows:

"The said John Fitzpatrick, Henry Brooks and William Corbett at or near Dyea, within the said district of Alaska, and within the jurisdiction of this court, and under the exclusive jurisdiction of the United States, on the 13th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, did unlawfully, wilfully, knowingly, feloniously, purposely, and of deliberate and premeditated malice make an assault upon one Samuel Roberts, and that they, the said John Fitzpatrick, Henry Brooks and William Corbett, a certain revolver, then and there charged with gunpowder and leaden bullets, which said revolver they, the said John Fitzpatrick, Henry Brooks and William Corbett, in their hands then and there had and held, then and there feloniously, purposely and of deliberate and premeditated malice did discharge and shoot off to, against and upon the said Samuel Roberts; and that said John Fitzpatrick, Henry Brooks and William Corbett with one of the bullets aforesaid out of the revolver aforesaid then and there by force of the gunpowder aforesaid by the said John Fitzpatrick, Henry Brooks and William Corbett, discharged and shot off as aforesaid then and there feloniously, purposely and with deliberate and premeditated malice did strike, penetrate and wound him, the said Samuel Roberts, in and upon the right breast of him, the said Samuel Roberts, then and there with the leaden bullet aforesaid so as aforesaid discharged and shot out of the revolver aforesaid by the said John Fitzpatrick, Henry Brooks and William Corbett, in and upon the right breast of him the said Samuel Roberts one

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mortal wound, of which said mortal wound he, the said Samuel Roberts, instantly died, and so the grand jurors duly selected, empaneled, sworn and charged as aforesaid upon their oaths do say: That said John Fitzpatrick, Henry Brooks and William Corbett did then and there kill and murder the said Samuel Roberts in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

"BURTON E. BENNETT,
"*U. S. District Attorney.*"

After a demurrer to the indictment, which was overruled, and a motion for a continuance, which was denied, Brooks and Corbett moved and obtained an order for separate trials. The court thereupon proceeded to the trial of Fitzpatrick, the jury returning a verdict of guilty "without capital punishment." Motions for a new trial and in arrest of judgment were entered, heard and overruled, and defendant sentenced to hard labor for life in the penitentiary at San Quentin, California. To review such judgment a writ of error was sued *in forma pauperis*.

Mr. A. B. Browne, *Mr. Julius Kahn* and *Mr. Alexander Britton* for plaintiff in error.

Mr. Solicitor General for the United States.

MR. JUSTICE BROWN, after making the above statement, delivered the opinion of the court.

1. A suggestion is made by the government of a want of jurisdiction in this case, upon the ground that it is not of a "conviction of a capital crime" within section five of the Court of Appeals act of March 3, 1891, c. 517, 26 Stat. 826, as amended by act of January 20, 1897, c. 68, 29 Stat. 492, specifying the cases in which a writ of error may be issued directly to a District Court. It is clear, however, that, as section 5339 of the Revised Statutes inflicts the penalty of death for murder, the power given

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the jury by the act of January 15, 1897, c. 29, 29 Stat. 487, to qualify the verdict of guilty by adding the words "without capital punishment," does not make the crime of murder anything less than a capital offence, or a conviction for murder anything less than a conviction for a capital crime, by reason of the fact that the punishment actually imposed is imprisonment for life. The test is not the punishment which *is* imposed, but that which *may be* imposed under the statute. As was observed in *In re Claasen*, 140 U. S. 200, 205, with respect to infamous crimes under the Court of Appeals act prior to its amendment: "A crime which is punishable by imprisonment in the state prison or penitentiary, as the crime of which the defendant was convicted, is an infamous crime whether the accused is or is not sentenced or put to hard labor; and that, in determining whether the crime is infamous, the question is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one." See also *Ex parte Wilson*, 114 U. S. 417, 426; *Logan* v. *United States*, 144 U. S. 263, 308; *The Paquete Habana*, 175 U. S. 677, 682; *Motes* v. *United States*, *post*. A conviction for murder, punishable with death, is not the less a conviction for a capital crime by reason of the fact that the jury, in a particular case, qualifies the punishment.

2. The first question raised by the plaintiff in error relates to the sufficiency of the indictment, which was for a violation of Rev. Stat., section 5339. This section, eliminating the immaterial clauses, declares that "every person who commits murder . . . within any fort . . . or in any other place or district of country under the exclusive jurisdiction of the United States . . . shall suffer death." This section does not define the crime of murder, but prescribes its punishment.

By section seven of an act providing a civil government for Alaska, approved May 17, 1884, c. 53, 23 Stat. 24, it is enacted "that the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." We are, therefore, to look to the law of Oregon and the interpretation put thereon

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by the highest court of that State, as they stood on the day this act was passed, for the requisites for an indictment for murder rather than to the rules of the common law.

By Hill's Annotated Laws of Oregon, section 1268, c. 8, title 1, relating to criminal procedure, an indictment must contain:

"1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties;

"2. A statement of the acts constituting the offence, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

In *State* v. *Dougherty*, 4 Oregon, 200, 205, the Supreme Court of that State had held that "the indictment should always contain such a specification, of acts and descriptive circumstances as will, upon its face, fix and determine the identity of the offence, and enable the court, by an inspection of the record alone, to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law."

By section 1270, Hill's Laws, it is provided that "the manner of stating the act constituting the crime, as set forth in the appendix to this code, is sufficient, in all cases where the forms there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit;" and in an appendix to this section the following form is given for murder: "And purposely and of deliberate and premeditated malice killed C. D. by shooting him with a gun or pistol, or by administering to him poison, or," etc.

It will be noticed that section 1270 only declares that the form given in the appendix is sufficient in all cases where the forms there given are applicable, but it does not purport to be exclusive of other forms the pleader may choose to adopt. It does not declare the insufficiency of other forms, but merely the sufficiency of those contained in the appendix. We are, therefore, remitted to section 1268 to inquire whether the indictment contains "a statement of the acts constituting the offence, in ordinary and concise language, without repetition,

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and in such manner as to enable a person of common understanding to know what is intended." This section was doubtless intended to modify to a certain extent the strictness of the common law indictment, and simply to require the statement of the elements of the offence in language adapted to the common understanding of the people, whether it would be regarded as sufficient by the rules of the common law or not. *People* v. *Dolan*, 9 Cal. 576; *People* v. *Ah Woo*, 28 Cal. 205; *People* v. *Rodriguez*, 10 Cal. 50. As was said by this court in *United States* v. *Cruikshank*, 92 U. S. 542, 558, "the object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

The indictment in this case, omitting the immaterial parts, avers that the accused "did unlawfully, wilfully, knowingly, feloniously, purposely, and of deliberate and premeditated malice, make an assault upon one Samuel Roberts," and a certain loaded revolver "then and there feloniously, purposely and of deliberate and premeditated malice did discharge and shoot off to, against and upon the said Samuel Roberts," and one of the bullets aforesaid, discharged as aforesaid, "feloniously, purposely and deliberate and premeditated malice did strike, penetrate and wound him, the said Samuel Roberts, in and upon the right breast, . . . one mortal wound, of which he, the said Samuel Roberts, instantly died;" and further, that the defendants "did then and there kill and murder the said Samuel Roberts in the manner and form aforesaid, contrary," etc.

Defendant criticises this indictment as failing to aver deliberate and premeditated malice in killing Roberts, although it is averred that the defendants did, with deliberate and premeditated malice, inflict a *mortal* wound, of which he instantly died, and that they killed and murdered him in the manner and form aforesaid. If, as alleged in the indictment, they, with deliberate and premeditated malice, shot Roberts in the breast with a

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revolver, and inflicted a mortal wound, of which he instantly died, they would be presumed to contemplate and intend the natural and probable consequences of such act; and an additional averment that they, with deliberate and premeditated malice intended to kill him, was quite unnecessary to apprise the common understanding of their purpose. If they purposely inflicted a mortal wound, they must have intended to kill. No person could have a moment's hesitation as to what it was intended to aver, namely, that the defendants had been guilty of a deliberate and premeditated murder; and while a number of cases are cited which lend some support to the argument of the defendant, there was no such statute involved as section 1268 of the Oregon Code. We have no doubt the indictment furnished the accused with such a description of the charge as would enable him to avail himself of a plea of former jeopardy, and also to inform the court whether the facts were sufficient in law to support a conviction, within the ruling in the *Cruikshank case*. While we should hold an indictment to be insufficient that did not charge in definite language all the elements constituting the offence, we have no desire to be hypercritical or to require the pleader to unduly repeat as to every incident of the offence the allegation of deliberateness and premeditation. We are bound to give some effect to the provisions of section 1268 in its evident purpose to authorize a relaxation of the extreme stringency of criminal pleadings, and make that sufficient in law which satisfies the "common understanding" of men.

3. Certain exceptions to the admission of testimony render it necessary to notice the more prominent facts of the case. The murder took place at Dyea, Alaska, just outside the cabin of Roberts. Roberts conducted certain games at the Wonder Hotel or saloon, and slept in his cabin across the street, about a hundred and fifty feet from the saloon. Ross and Brennan, two of the government witnesses, were employed by Roberts in connection with the games. Ross testified that, about two o'clock in the morning, Roberts, the deceased, asked the witnesses to accompany him from the Wonder Hotel to the cabin, and to carry a sack of money used at the games. Roberts was

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in the habit of going to his cabin every night accompanied by a man carrying the sack. They entered the cabin, and, while Roberts struck a match, something suspicious seemed to occur, and both stepped outside the door. Instantly there was a report of a gun inside the cabin. Roberts crowded witness off the porch, the sack of money fell off witness's shoulder, and he fell off the steps. As he fell he heard the report of a pistol from outside the cabin, and soon heard hurried footsteps close to him. He then heard the report of a gun from inside the cabin, and in a few seconds a man came out, stood on the porch, raised his gun and fired two shots in the direction of the Wonder Hotel, turned to the right in a leisurely manner, got off the steps and disappeared behind the north side of the house. Witness recognized this man as Fitzpatrick, the defendant. As Fitzpatrick disappeared, witness called for help, and Brennan and others came over from the hotel with a lantern. Roberts was found lying on his back, fatally wounded, and almost immediately died.

Brennan, who was at the hotel, saw Roberts start with Ross, with the sack, to go to the cabin. In a few minutes he heard a shot, and started toward the door, but before he got to the door there was another shot, and, when he reached the pavement, still another, which seemed to come from the cabin. Witness ran back to the hotel, got a gun and lantern, ran across the street, found Ross first, and then Roberts on his back dying. There was some other testimony to the same general effect.

The testimony to which objection was made was that of Ballard, a soldier on guard duty at Dyea on the night of the occurrence, who testified that about two o'clock in the morning he heard four or five shots from the direction of Roberts' cabin and the Wonder Hotel, and that some fifteen or twenty minutes or half an hour thereafter, a man came to him. "I was in the cabin, and he rapped on the door, and I went and opened the door for him, and he said he would like to get a doctor. He was shot. . . . I directed him to the hospital in town, and he went that way." Witness said that he did not know the man, but was afterwards told that his name was Corbett. He was brought into court, but witness could not identify him with certainty.

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Objection was also made to the testimony of Dr. Price, who swore that about three o'clock in the morning Corbett applied to him for medical assistance; that he was wounded in the right shoulder, and witness was in attendance upon him about three weeks or a month. Also to the testimony of John Cudihee, deputy United States marshal, who arrested Fitzpatrick, Brooks and Corbett the day of the murder, and made an investigation. He found Roberts in his cabin dead, then went to Fitzpatrick and Corbett's cabin, and found there a lot of shoes and clothing covered with blood. The witness produced the shoes in evidence, pointed out which pair was Fitzpatrick's and which was Corbett's, explained that Fitzpatrick had identified the shoes in his office, and pointed out which pair was Corbett's and which was his. Witness also pointed out the blood stains on both shoes. Corbett's shoe fitted the footprints in the sand which the witness found in the rear of Roberts' cabin, where the shooting occurred. The shoe had hobnails in it, and the heel of one was worn off so the print in the sand was a peculiar one.

Objection was made to the admission of any testimony relating to the acts of Corbett, and especially that which occurred after the alleged crime had been committed. No direct testimony appears in the record showing the presence of Corbett at the cabin before, during or after the commission of the crime for which Fitzpatrick was then on trial. Had the statement of Corbett, that he was shot, and inquiring for a doctor, tended in any way to connect Fitzpatrick with the murder, it would doubtless have been inadmissible against him upon the principle announced in *Sparf and Hansen* v. *United States*, 156 U. S. 51, that statements made by one of two joint defendants in the absence of the other defendant, while admissible against the party making the statement, are inadmissible against the other party. In that case declarations of Hansen connecting Sparf with the homicide there involved, tending to prove the guilt of both, and made in the absence of Sparf, were held inadmissible against the latter. This is a familiar principle of law; but the statement of Ballard was not within this rule. Corbett had evidently been wounded, and was asking for a doctor. His accompanying statement that he was shot was clearly compe-

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tent to explain his condition, and had no tendency whatever to connect Fitzpatrick with the transaction. This statement, as well as that of Dr. Price, to the effect that he found Corbett with a wound in his right shoulder, and that of Cudihee as to finding a lot of shoes and clothing covered with blood, and connecting one pair of these shoes with the footprints found near Roberts' cabin, were all facts connected with the crime which the government was entitled to lay before the jury. Fitzpatrick and Corbett roomed together. Their bloody clothes and shoes were found in their cabin the morning after the murder. Brooks had roomed with them. Brooks and Corbett in their affidavit for a continuance swore in effect that they were together that night, and attempted to establish a joint alibi.

There was no doubt that a homicide had been committed, and it was the province of the jury to determine whether the defendant was a guilty party. Any fact which had a bearing upon this question, immediate or remote, and occurring at any time before the incident was closed, was proper for the consideration of the jury. Of course, statements made in the absence of Fitzpatrick implicating him with the murder would not be competent, but none such were admitted; but any act done, whether in Fitzpatrick's presence or not, which had a tendency to connect him with the crime, was proper for the consideration of the jury, and the fact that Corbett was not then on trial is immaterial in this connection. As there was some evidence tending to show a joint action on the part of the three defendants, any fact having a tendency to connect them with the murder was competent upon the trial of Fitzpatrick. The true distinction is between statements made after the fact, which are competent only against the party making the statement, and facts connecting either party with the crime which are competent as a part of the whole transaction. In the trial of either party it is proper to lay before the jury the entire affair, including the acts and conduct of all the defendants from the time the homicide was first contemplated to the time the transaction was closed. It may have a bearing only against the party doing the act, or it may have a remoter bearing upon the other defendants; but such as it is, it is competent to be laid before the jury.

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In *People* v. *Cleveland*, 107 Mich. 367, error was assigned by the defendant in permitting the prosecution to show the acts of one Mehan, jointly indicted with Cleveland in the affray; his appearance on the way to Jackson, and on the succeeding days; the excuse he gave for his then condition, and the result of an examination of his clothing. But the court said: "It is apparent from the testimony that the three parties, when they left Jackson, had arranged to engage in this robbery, . . . and the arrangement had been carried out so far as they were able to do so. It was therefore proper to show the condition of Mehan, who was not on trial, for the purpose of establishing his identity as one of the men who accompanied the respondent Cleveland from Jackson to Somerset Center, thus identifiying the latter's connection with the robbery."

So, in *Angley* v. *State*, 35 Tex. Crim. Rep. 427, error was assigned upon the admission of testimony to show the character of shoes Rice (who was connected with the transaction but not jointly indicted) had on when arrested the day after the assault. One ground of the objection was that Rice was not jointly indicted with Angley. When Rice was arrested and his shoes examined it was found that one of them had a hole in the sole fitting a corresponding peculiarity in the track found upon the ground. The court held this testimony proper, though Rice was separately indicted, because the conspiracy had been shown. This was a circumstance tending to show that he was one of the parties present at the time the assault was committed.

4. Error is also assigned in not restricting the cross-examination of the plaintiff in error. Defendant himself was the only witness put upon the stand by the defence, who was connected with the transaction; and he was asked but a single question, and that related to his whereabouts upon the night of the murder. To this he answered: "I was up between Clancy's and Kennedy's. I had been in Clancy's up to about half-past twelve or one o'clock—about one o'clock, I guess. I went up to Kennedy's and had a few drinks with Captain Wallace and Billy Kennedy, and I told them I was getting kind of full and I was going home, and along about quarter past one Wallace brought me down about as far as Clancy's, and then he took me down

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to the cabin and left me in the cabin, and we wound the alarm clock and set it to go off at six o'clock, and I took off my shoes and lay down on the bunk and woke up at six o'clock in the morning, and went up the street."

On cross-examination the government was permitted, over the objection of defendant's counsel, to ask questions relating to the witness's attire on the night of the shooting, to his acquaintance with Corbett, whether Corbett had shoes of a certain kind, whether witness saw Corbett on the evening of March 12, the night preceding the shooting, whether Corbett roomed with Fitzpatrick in the latter's cabin, and whether witness saw any one else in the cabin besides Brooks and Corbett. The court permitted this upon the theory that it was competent for the prosecution to show every movement of the prisoner during the night, the character of his dress, the places he had visited and the company he had kept.

Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defence, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow

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occupants of the same room. While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury, *State* v. *Ober*, 52 N. H. 459; and it is also held in a large number of cases that when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses. If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of *State* v. *Lurch*, 12 Oregon, 99, is authority for saying that this would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself. *State* v. *Saunders*, 14 Oregon, 300, is also authority for the proposition that he cannot be compelled to answer as to any facts not relevant to his direct examination.

5. Error is also assigned to the action of the court in permitting the government to call and examine witnesses in rebuttal with respect to the effect of light from the flash of a revolver, and whether such light would be sufficient to enable a person firing the revolver to be identified. One of the witnesses, Ross, testified on cross-examination that although the night was dark, he identified Fitzpatrick by the flash of the pistol shots.

Had the defence put in no evidence whatever upon the subject, the question would have been presented whether it was or was not a matter of discretion for the court to admit this testimony in rebuttal; but in view of the fact that the defence put in a calendar apparently for the purpose of showing the time that the moon rose that night, as having some bearing upon this question, there was no impropriety in putting in this testimony.

There was no error committed upon the trial prejudicial to the defendant, and the judgment of the District Court is therefore

Affirmed.

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Ex parte THE UNION STEAMBOAT COMPANY.

ORIGINAL.

No. 12. Original. Submitted May 14, 1900.—Decided May 28, 1900.

Where this court in a collision case directed a decree dividing the damages as between the two vessels, and allowing to the owners of the cargo of one vessel a full recovery against the other vessel; and the court below, upon the production of the mandate of this court, refused to permit the latter vessel to recoup against the other one half the damages to the cargo, it was held that the remedy was by a new appeal and not by *mandamus* from this court, no disobedience of the mandate being shown.

THIS was a petition for a writ of mandamus to the District Court for the Eastern District of Michigan, commanding it to set aside a decree entered in the case of *The New York*, 175 U. S. 187, and enter a decree dividing the damages equally, so that petitioner would not be decreed to pay more than one half the total damages arising out of the collision between the New York and the Conemaugh, with interest thereon not exceeding five per cent per annum.

Upon the opinion of this court in the case of *The New York* being filed, a mandate issued that the decree of the Court of Appeals be reversed, and the case remanded to the District Court, with direction "to enter a decree in conformity with the opinion of this court, with interest at the same rate per annum that decrees bear in the State of Michigan." Upon the case coming on to be heard in the District Court, the petitioner, the Union Steamboat Company, owner of the propeller New York, submitted a decree to the effect that both vessels were in fault for the collision, and that the damages resulting therefrom be equally divided between the Erie and Western Transportation Company, owner of the Conemaugh, and the Union Steamboat Company, owner of the New York; that such damages amounted in all to the sum of $74,319.49, of which certain intervening underwriters of the cargo were entitled to, and recovered from the Steamboat Company, $19,841.56; that

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the Transportation Company, as trustees for the underwriters and owners of the cargo of the Conemaugh, not intervening, suffered damages in the sum of $19,627.67; that, as owner of the propeller, it had suffered damages in the sum of $30,508.46, aggregating the sum of $50,136.13; that the Transportation Company recover of the petitioner one half of $50,136.13, less one half the sum of $19,541.56, decreed to be paid to the intervening petitioners, etc.

The court, however, declined to enter this decree; refused to permit the petitioner to recoup any sum that it might pay to the owners or underwriters of the cargo of the Conemaugh, from any sum that was due from the Steamboat Company for damages sustained by the Conemaugh, so that such company was compelled to pay of the total damages about seventy-six per cent instead of fifty per cent thereof.

Mr. C. E. Kremer, *Mr. H. C. Wisner*, *Mr. F. C. Harvey* and *Mr. W. O. Johnson* for petitioners.

Mr. Harvey D. Goulder, *Mr. S. H. Holding*, *Mr. F. S. Mast* and *Mr. Frank H. Canfield* for respondent.

Mr. F. H. Canfield filed a brief for Intervening Underwriters.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Petitioner applies for this writ of mandamus upon the ground that the District Court refused to enter a decree in conformity with the opinion of this court dividing the damages, but in effect entered a decree imposing upon the Union Steamboat Company, the petitioner, about seventy-six per cent of the damages occasioned by the collision.

The duty of an inferior court upon receiving the mandate of this court is nowhere better described than by Mr. Justice Baldwin in an early case upon that subject, *Ex parte Sibbald* v. *United States*, 12 Pet. 488, 492: "Whatever," said he, "was before the court, and is disposed of, is considered as finally

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settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. . . . If the special mandate, directed by the twenty-fourth section, (of the judiciary act,) is not obeyed or executed, then the general power given to all courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, by the fourteenth section of the judiciary act, fairly arises, and a mandamus or other appropriate writs will go," although an appeal will also sometimes lie. *Perkins* v. *Fourniquet*, 14 How. 328, 330; *Milwaukee & Minnesota Railroad Co.* v. *Soutter*, 2 Wall. 440, 443. See also *Boyce's Executors* v. *Grundy*, 9 Pet. 275; *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69; *Durant* v. *Essex Co.*, 101 U. S. 555; *In re Washington & Georgetown R. R. Co.*, 140 U. S. 91; *City Bank* v. *Hunter*, 152 U. S. 512; *In re City National Bank*, 153 U. S. 246; *In re Sanford Fork & Tool Co.*, 160 U. S. 247; *In re Potts*, 166 U. S. 263.

It is equally well settled, however, that such writ, as a general rule, lies only where there is no other adequate remedy and that it cannot be availed of as a writ of error. *In re Pennsylvania Co.*, 137 U. S. 451; *In re Morrison*, 147 U. S. 14, 26; *Ex parte Railway Co.*, 103 U. S. 794; *Ex parte Baltimore & Ohio R. R. Co.*, 108 U. S. 566; *In re Atlantic City R. R.*, 164 U. S. 633. The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 256, and the opinion of this court may be consulted to ascertain exactly what was decided and settled. *West* v. *Brashear*, 14 Pet. 51; *Supervisors* v. *Kennicott*, 94 U. S. 498; *Gaines* v. *Rugg*, 148 U. S. 228, 238, 244; *Sanford Fork & Tool Co.*, 160 U. S. 247, 256.

The libel in this case was for a collision between the Cone-

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maugh and the New York. The only questions decided were as to the respective faults of the two vessels, and the claim of the underwriters upon the Conemaugh's cargo, that they were entitled to a recovery to the full amount of their damages against the New York, notwithstanding the Conemaugh was also in fault for the collision. This claim was sustained, and directions given to enter a decree in conformity to the opinion of this court. Such decree was entered, dividing the damages between the two vessels, and awarding to the underwriters of the cargo a full recovery against the New York. It may be true that the decree holds the New York liable for seventy-six per cent of the entire damages and not fifty per cent, but this results from the fact that she was primarily held for the entire value of the cargo. The equal division applied only to the vessels, and upon the other hand if petitioner be entitled to the recoupment claimed, it would, apparently, result in an affirmative decree in its favor. But no question of recouping one half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by this court. It is now insisted that, under the cases of *The Chattahoochee*, 173 U. S. 540, and *The Albert Dumois*, 177 U. S. 240, this should have been done. This may be so; but it is an entirely new question, quite unaffected by the case of *The New York*, and if the court erred in refusing to allow such recoupment, the remedy is by appeal and not by mandamus. Perhaps a mandamus might lie to review the allowance of interest, but that may also be considered on appeal.

No disobedience of the mandate having been shown, the petition must be

Denied.

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WHEELER v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 534. Submitted May 14, 1900. — Decided May 28, 1900.

Under a statute of Connecticut, a contract was entered into between the city of Bridgeport and a railroad company providing that the city should pay one sixth of the expense of abolishing grade crossings, and also of increasing the tracks of the company from two to four. Defendants, whose lands were sought to be condemned for this purpose, objected upon the ground that the agreement of the city to pay one sixth of the expense of increasing the number of tracks was a practical donation by the city to the railroad company in violation of the state constitution, and was also a taking of their property without due process of law under the Fourteenth Amendment to the Federal Constitution. *Held*, that the Supreme Court of the State having decided that the right to condemn the land did not depend upon the obligation of the city to pay a part of the expenses, and that the defendants could not prevent a condemnation by showing that the company might not afterwards obtain a reimbursement from the city, and also that the defendants, not alleging that they were taxpayers or specially interested, were not in any position to question the validity of the proceedings, it followed that their property was not taken without due process of law.

THIS was a motion to dismiss the writ of error, and in default thereof to affirm the judgment of the Supreme Court of Errors of Connecticut.

The case originated in an application by the railroad company to the judge of the Superior Court to appoint appraisers to estimate the damages that might arise to the plaintiff in error from the taking of certain real estate in the city of Bridgeport, for the purpose of carrying out an agreement between the railroad company and the city of Bridgeport for the abolition of grade crossings. This agreement, which was entered into under the provisions of an act of the General Assembly, "providing for the abolition of grade crossings in Bridgeport," provided the manner, plans, method and time in

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which the grade crossings should be abolished, and the proportion of the cost thereof to be borne by the city of Bridgeport and the railroad company — the proportion of such cost to be paid by the city being one sixth and that by the railroad company five sixths, provided the total cost to be paid by the city should not exceed the sum of four hundred thousand dollars.

A demurrer to the application of the railroad company having been overruled, and a special defence in the answer having been stricken out as irrelevant and impertinent, an order was made appointing the appraisers. An appeal was taken to the Supreme Court of Errors, which affirmed the judgment of the judge of the Superior Court, and defendant sued out this writ of error, which defendant in error moves to dismiss for want of jurisdiction, or to affirm, upon the ground that the question upon which the jurisdiction depends is frivolous.

Mr. William D. Bishop, Jr., for the motion.

Mr. Robert E. DeForest and *Mr. George P. Carroll* opposing.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Plaintiffs assign as error that, in view of the fact that, by the agreement between the city and the railroad company, it was provided that the city should pay one sixth of the entire cost of the land required *for the construction of a four-track road*, as well as of all damages resulting from the changes of grade, there would be a reimbursement to the company for expenses in doing work and acquiring land not necessary or germane to the work of eliminating crossings at grade of the two present main tracks over the highways; and that, under these circumstances, the condemnation of defendants' property will be in furtherance of a scheme, whereby the city of Bridgeport will contribute and donate to such company the credit, money and property of the city, and of its property owners and taxpayers, in aid of the railroad company, contrary to the provisions of the twenty-fifth amendment to the constitution of

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the State of Connecticut, and the taking and condemnation of said Wheeler and Howes' said property will be a taking thereof without due process of law, etc.

1. We cannot say that there is no Federal question in this case. In their demurrer to the application of the railroad company, plaintiffs in error relied upon the unconstitutionality of this special act of the Connecticut legislature as contravening the twenty-fifth amendment to the constitution of the State, and the Fourteenth Amendment of the Federal Constitution. The amendment to the state constitution provides as follows: "That no County, City, Town, Borough, or other municipality, shall ever subscribe to the capital stock of any railroad corporation, or become a purchaser of the bonds, or make donation to, or loan its credit, directly or indirectly, in aid of any such corporation."

The claim was, not that it was unconstitutional for the city of Bridgeport to pay for a part of the work for grade crossing elimination, but that the pay for work for the benefit of the company, in the construction of a four-track road, which was not necessary or germane to the work of grade crossing elimination, would be contrary to the above amendment to the state constitution; and therefore that, as the land of Wheeler and Howes was to be taken to carry out a part of the project, to be paid for in part by the city, not necessary or germane to the work of grade crossing elimination, their property would be taken without due process of law. The substance of the defence seems to have been that the land was not taken solely for the purpose of abolishing grade crossings, but also for the purpose of laying two extra tracks, and making the road through the city of Bridgeport a four-track road instead of an ordinary double track. It seems that the railroad company had laid a complete four-track road all the way from New York to New Haven, except in that section which lay in the city of Bridgeport—a distance of more than four miles, and crossing at grade twenty-four streets, some of them the most frequented in the whole city. There is no doubt that the special act did authorize an increase in the number of tracks, and there was some reason for saying that in requiring the city to pay one sixth of

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the expenses incurred for this purpose, it was making a donation in aid of the railroad company in violation of the twenty-fifth amendment to the state constitution, and as Wheeler and Howes were property owners and taxpayers of the city, they were incidentally affected by this, and therefore their lands were illegally taken.

2. But assuming that there was color for the motion to dismiss, we are clearly of the opinion that the decree of the Supreme Court of Errors should be affirmed. That court had already decided, not only that the legislature might compel the removal of grade crossings and the payment of the expenses therefor, either by the railroad company or by the city, or by both, *Woodruff* v. *Catlin*, 54 Conn. 277, (a case arising under a former act,) and that a statute compelling the removal of grade crossings, as well as imposing upon the railroad the entire expense of the change of grade, was constitutional, *N. Y. & N. E. R. R. Co.'s Appeal*, 58 Conn. 532; *N. Y. & N. E. R. R.* v. *Bristol*, 151 U. S. 556; but the very act in question in this case has also been held to be constitutional. *Mooney* v. *Clark*, 69 Conn. 241. That court also held in this case that, whether the land be taken only for the purpose of abolishing grade crossings or to straighten its line and construct additional tracks, the taking is in either case for railroad purposes and for a public use. It also held that the right of the railroad company to condemn defendants' property did not depend upon the validity of any part of the special act of 1895, since by the resolution of the board of directors of the company in July, 1896, and by the approval of the commissioners in June, 1897, both of which were alleged in the application, the railroad company was entitled under section 346 of the General Statutes to take the land for the uses named in the resolution.

The plaintiffs in error contended before the Supreme Court of Errors, as they contend here, that the agreement and order made in pursuance thereof, imposing upon the city a proportion of the expense of constructing the two additional elevated tracks, not necessary to the work of eliminating grade crossings, violated the state constitution as well as the Constitution of the United States. "But," said the court, "if the railroad company

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desires to take this property as one step in carrying out the proposed plan, the defendants cannot prevent it upon the ground that the company may not afterwards be able to obtain reimbursement from the city. The ability of the defendants to obtain payment of their damages does not depend upon the right of the railroad company to collect a part of it from the city. Before taking the land the company must compensate the defendants." It was further said: That even if the employment of appraisers had established the liability of the city to pay a proportion of the expense of laying the additional tracks, such a defence was not open to the defendants, because they have not alleged that they were taxpayers or had any right or authority to represent the city in such proceedings, or that they will be injured in any respect from the payment by the city of its part of the expense of the work as fixed by the agreement and order. "But," says the court, "the appointment of appraisers in this proceeding does not affect the question of the liability of the city to pay that part of the expense ordered by the commissioners. The right of the railroad company to have appraisers appointed and to take this property does not depend upon the obligation of the city to pay a one sixth part of the expense of the whole, or of any portion of the work of this undertaking. The two purposes of the act of 1895 were: First, the removal of all existing grade crossings in Bridgeport, and the construction, in the most feasible manner, after considering the interest of the public, the rights, responsibilities and duties of the railroad company, and of the city, and the rights of other parties concerned, of a four-track railroad through the city, in such a way as to avoid crossing any highway at grade; and, second, a just apportionment of the cost among those who ought to bear the expense of performing the work in the manner determined. These two purposes are so far distinct and separable, and are so intended to be by the act, that neither the right of the railroad company to perform the work according to the plans approved by commissioners, nor the power of the commissioners to compel its performance, depends upon a previous apportionment of the expense between the parties who should bear it. Section 12, as we have already said, provides that if no agreement shall have been made as authorized by section 2,

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the commissioners, after the work shall have been completed, shall apportion the entire expense among the proper parties."

The court intimated no opinion as to whether the agreement and order fixing the proportionate part of the entire expense to be paid by the city was of doubtful validity. It thought the question was one which could not properly be raised in this proceeding.

The court held in substance (1) that the right to have appraisers appointed did not depend upon the obligation of the city to pay a part of the expense, and that defendants could not prevent a condemnation by showing that the company might not afterwards be able to obtain reimbursement from the city; and (2) that the defendants, not alleging that they were taxpayers, or specially interested, were not in a position to question the validity of the proceedings. If this be so, it requires no argument to show that they are not in a position to contend that their property has been taken without due process of law. If the court had gone farther, and held that the taking of defendants' property for the purpose, not only of abolishing grade crossings, but of enabling the railroad company to lay additional tracks, was not a violation of the twenty-fifth amendment to the state constitution, that would have been exclusively a local question, and would have involved no question of an unlawful taking of defendants' property within the Fourteenth Amendment.

If the fact that the city of Bridgeport contributed to the expense of abolishing grade crossings, and incidentally thereto, to the construction of additional tracks, does no violence to the constitutional provision that no city shall make a donation in aid of a railroad corporation, as held by the Supreme Court of Connecticut, much less does it make a case of taking the property of petitioners, whether as property owners or as taxpayers, without due process of law.

The decree of the Supreme Court of Errors of the State of Connecticut is, therefore,

Affirmed.

Mr. Justice Gray did not sit in this case and took no part in the decision.

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Syllabus.

MUTUAL LIFE INSURANCE COMPANY *v.* PHINNEY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 12. Argued January 22, 23, 1900.—Decided May 28, 1900.

Upon the showing made by the Court of Appeals, it is clear that that court had jurisdiction, and should have proceeded to dispose of this case on its merits, instead of dismissing it for want of jurisdiction.

The plaintiff in error is a corporation, organized under the laws of the State of New York, and doing business as life insurers in the city of New York. It had an agent in the State of Washington, to whom Phinney, a resident in that State applied for a policy on his life. The application stated that it was made subject to the charter of the company and the laws of New York. A policy was issued which provided that on its maturing payment was to be made at the home office of the company in New York, and on its receipt Phinney paid the first premium. The policy provided that he should pay a like premium for twenty years, if he should live so long, and that the policy should become void by non-payment of the premium, with a forfeiture of previous payments. Phinney failed to make the next annual payment. Then he surrendered the policy to the local agent. He died without having made that payment, or the next one which matured before his death. His widow was appointed his executrix. She presented to the company a claim for the amount of the insurance under the policy. It was rejected. This suit was thereupon brought. In its answer the company set up that the contract was not to be taken as a contract under the laws of the State of New York, but under the laws of the State of Washington, and the company asked this instruction, which the court declined to give. "If you find from the evidence in this case that the said Guy C. Phinney stated to the representative of the defendant in the State of Washington that he could not pay the premium falling due September 24, 1891, and that he did not pay nor tender the same, and that he thereafter surrendered said policy to the defendant's representative, they mutually believing and understanding that the same was of no force or validity then or thereafter, by reason of the non-payment of the said premium, this would constitute an abandonment and rescission of this contract by both parties thereto, and would put an end to the same; and if you find the facts so to be, you must find a verdict for the defendant." The jury trial resulted in a verdict and judgment for the plaintiff. This was taken in error to the Court of Appeals for the Ninth Circuit which dismissed the writ of error on the ground that it had no jurisdiction by reason of a failure on the part of the plaintiff in error to file the writ in the office of the trial court. *Held*:

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Statement of the Case.

(1) That the Court of Appeals had jurisdiction;
(2) That, without deciding it, the court would hold for the purposes of this case that the contract was made under the laws of the State of New York, and was governed by the laws of that State;
(3) That it is to be presumed that each party knew what the laws of New York were, and neither could be misled by any statement in respect thereto on the part of the other;
(4) That there is nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as with any other contract, and if they chose to abandon it their action is conclusive.

After the company had once excepted to the refusal of an instruction which it had asked, and excepted to those which were given, it did not lose the benefit of such exceptions by a request that the court repeat the instructions excepted to, in connection with certain answers made to questions propounded by the jury.

On September 22, 1890, Guy C. Phinney, a resident of the State of Washington, applied to the Mutual Life Insurance Company of New York for a policy of insurance on his life for the sum of $100,000, payable to his executors, administrators or assigns. This application was forwarded by the local agent at Seattle to the general agent of the company at San Francisco, and by him to the home office of the company in New York city. By reason of such application a policy was issued to Phinney, bearing date September 24, 1890, forwarded to the general agent at San Francisco, by him to the local agent at Seattle, and by the latter delivered to Phinney, who received it, and at the same time paid the first year's premium, amounting to $3770. The policy provided that Phinney should pay the annual premium of $3770 on September 24 of each year thereafter for twenty full years, provided he should live so long, and also "this policy shall become void by non-payment of the premium; all payments previously made shall be forfeited to the company, except as hereinafter provided." This last exception referred to certain provisions as to surrender value and readjustment of the amount of insurance on the payment of a certain number of payments, none of which are material to the question at issue in this case. Prior to September 24, 1891, notices were sent by both the general agent at San Francisco and the local agent at Seattle to Phinney that his premium would be due on September 24, 1891. Twice between the time

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of the receipt of this notice and the 24th of September, 1891, Phinney met Stinson, and requested him to accept his notes for the payment of the premium. This proposition was declined by Stinson, who declared at the time that he was unable to advance the premium for Phinney. Some time after September 24, 1891, (the exact date being unknown, but, according to the testimony from four to six weeks thereafter,) Phinney again met Stinson, and stated that he was prepared to pay the premium, but was told that it could not be accepted unless a certificate of health was furnished. No certificate of health was ever furnished. Phinney stated that he could not obtain it, as he had been rejected by another company a few days before, nor was there ever any formal tender of the premium. In December, 1891, or January, 1892, Stinson requested Phinney to allow him to have the policy to use for canvassing purposes, and Phinney thereupon surrendered the policy to the agent, with the statement that as the same had lapsed he had no further use for it. Stinson received the policy, and never returned it to Phinney. On September 24, 1892, the premium falling due on that day was neither paid nor tendered by Phinney, nor did he after the surrender of the policy in December, 1891, or January, 1892, ever take any action in regard thereto, or pay, or offer to pay, any premium thereon. On September 12, 1893, Phinney died, leaving his last will and testament, wherein he nominated the plaintiff as executrix. Nothing was done by her under this policy until July, 1894, although Phinney held policies in two other companies at the time of his death, proofs in respect to which were presented by the executrix within one month after his death. At that time she wrote to the insurance company a letter, in which she stated as follows:

"SEATTLE, WASH'N, *July* 11, 1894.

"The Mutual Life Insurance Co. of New York:

"Gentlemen: On September 24, 1890, my husband, Guy C. Phinney, took out a policy, No. 422,198, in your company in the sum of one hundred thousand dollars. He died in this city last September 12, 1893. Not being familiar with his affairs, and the policy being mislaid, I was not aware that he held such

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a policy until a few days ago, when the matter was brought to my attention."

In addition, it appears that on the 16th day of September, 1893, in her application for probate of her husband's will, she filed an affidavit, which contained these statements:

"Real estate, consisting of lands in said King County, of town lots in the city of Seattle, and of improved city property, the exact description of all which is at this time unknown to your petitioner, but which is entirely community estate, the value of which is about three hundred thousand dollars; that there is personal property of various kinds, all of the same being community property of the value of about fifty thousand dollars; that the total estate of said deceased, including the community interest of your petitioner, who is the widow of the said deceased, does not exceed in value the sum of about three hundred and fifty thousand dollars."

In July, 1894, (evidently at the suggestion of counsel,) she presented her claim under the policy, which was rejected, and thereupon this suit to recover thereon was brought in the Circuit Court of the United States for the District of Washington.

At the time the application was made and the policy issued the following statute was in force in the State of New York:

"Section one of chapter 341 of the laws of eighteen hundred and seventy-six, entitled an 'Act regulating the forfeiture of life insurance policies,' is hereby amended so as to read as follows:

"SEC. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if

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notice of the assignment has been given to the company, at his or her last known post office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

"SEC. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given." Act of May 23, 1877, Laws of 1877, c. 321.

In 1892, and after the first default in the payment of premium by Phinney and the surrender of his policy to the agent, Stinson, the following statute was substituted for the act of 1877:

"SEC. 92. No forfeiture of policy without notice. — No life insurance corporation doing business in this State shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason

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of non-payment when due of any premium, interest or instalment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, instalment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

"The notice shall also state that unless such premium, interest, instalment or portion thereof, then due, shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as the right to a surrender value or paid-up policy as in this chapter provided.

"If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed, until the expiration of thirty days after the mailing of such notice.

"The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." Laws 1892, c. 690.

The application made by Phinney for the policy contained this statement: "This application is made to the Mutual Life Insurance Company of New York, subject to the charter of the company and the laws of the State of New York." The policy stipulated that on its maturing the insurance company would "pay at its home office in the city of New York." It also stipulated that the annual premium should be payable "to the com-

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Counsel for Parties.

pany at its home office in the city of New York." The policy also contained this provision:

"Payment of premiums.—Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

In its answer the company pleaded that the contract was to be taken as a contract made in the State of Washington, and not controlled by the laws of the State of New York, because the application stipulated that the contract "shall not take effect until the first premium shall have been paid and the policy shall have been delivered." In fact, the policy was delivered and the premium paid in the State of Washington. It also pleaded the other provisions in reference to the failure to pay the annual premium, and the waiver, abandonment and rescission of the contract by the assured under the circumstances hereinbefore named.

The case came on for trial on these pleadings before the court and a jury, and resulted in a verdict and judgment for the plaintiff for the amount of the policy, less the unpaid premiums. The case was thereupon taken on error to the United States Circuit Court of Appeals for the Ninth Circuit, which court dismissed the writ of error on the ground that it had no jurisdiction by reason of a failure on the part of the plaintiff in error to file the writ of error in the office of the clerk of the trial court. 48 U. S. App. 78. Thereupon application was made to this court, and the case brought here on certiorari.

Mr. Julien T. Davies for petitioner. *Mr. Edward Lyman Short*, *Mr. John B. Allen* and *Mr. Frederic D. McKenney* were on his brief.

Mr. Stanton Warburton for respondent. *Mr. A. F. Burleigh* was on his brief.

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Opinion of the Court.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The first question naturally is in respect to the jurisdiction of the Circuit Court of Appeals. The transcript filed in that court, in addition to the record of the proceedings on the trial, which trial culminated in a judgment on October 17, 1895, contained: First, a petition for a writ of error filed by counsel for the insurance company, on December 14, 1895; then an order by the trial judge, allowing the writ of error and fixing the supersedeas bond at $125,000; an assignment of errors; a supersedeas bond, approved by the trial judge; a citation signed by him, and service admitted by counsel for the plaintiff, all these on the same day. In addition, a return by the marshal, showing personal service on the plaintiff of the citation; the writ of error allowed by the trial judge, and an indorsement thereon by the clerk of the trial court (by deputy) in the following language:

"Received a true copy of the foregoing writ of error for defendant in error. Dated this 14th day of December, 1895. A. Reeves Ayres, Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington. By R. M. Hopkins, Deputy Clerk."

On the hearing in the Court of Appeals an affidavit of the deputy clerk of the trial court was filed, which, after averring that the petition and assignment of errors, the orders granting the writ of error, and fixing the amount of the bond, and the bond, were each on file in his office and all bore the following indorsement: "Filed December 14, 1895. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy Clerk;" stated that upon the filing of these papers he prepared a writ of error, issued and delivered it to R. C. Strudwick, one of the attorneys of the insurance company, who took the same from his office, and added:

"That a few minutes thereafter the said Strudwick returned to my office, and delivered to and lodged and filed with me said writ of error, with the allowance thereof indorsed thereon by the before mentioned judge, and at the same time delivered to

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and lodged and filed with me a copy of said writ for the use of defendant in error.

"That said original writ of error remained in my office and in my custody from said 14th day of December, 1895, until the 4th day of January, 1896, at which time I transmitted the same, with my return thereto, to this honorable court.

"That the original citation herein, a copy of which appears on pages 395 and 396 of the printed record herein, was returned to and filed with me by a deputy marshal of the United States for the District of Washington, on the 18th day of December, 1895, and the same remained in my office and in my custody and control from said date until the same was transmitted to this honorable court, together with the writ of error and return thereto on the 4th day of January, 1896. It has not been my custom to indorse original citations and writs of error at the time they are filed with or served upon me, for the reason that I have deemed the same as writs of the Circuit Court of Appeals to be indorsed by the clerk of said court upon his receipt of the same with my return thereto; but, as a matter of fact, the writ of error and citation herein were actually delivered to and filed and lodged with me as above stated."

Upon these facts we are clearly of opinion that jurisdiction was vested in the Court of Appeals. The majority of that court, in sustaining the motion to dismiss, relied on the following decisions of this court: *Brooks* v. *Norris*, 11 How. 204–207; *Mussina* v. *Cavazos*, 6 Wall. 355; *Scarborough* v. *Pargoud*, 108 U. S. 567; *Polleys* v. *Black River Improvement Co.*, 113 U. S. 81; *Credit Company, Limited*, v. *Arkansas Central Railway Co.*, 128 U. S. 258; in the first of which it was said by Chief Justice Taney: "It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly. The day on which the writ may have been issued by the clerk or the day on which it is tested are not material in deciding the question."

In that case the question presented was one of limitations, and not what was necessary to constitute a filing. The statute requiring writs of error to be brought within a certain time, the

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question determined was whether the mere allowance or issue of the writ constituted the bringing of the writ of error within the meaning of the statute, or whether, as was held, it was not brought, had not performed its office, until it had been filed with the clerk of the trial court. In this case there is no question of time. All the proceedings, with a view of taking the case to the appellate court, were had within less than three months from the date of the judgment. The transcript filed in the Court of Appeals made it clear that everything which the trial judge was required to do was done, the writ of error was allowed, the citation signed and bond approved, and also that the citation was duly served upon the counsel for the plaintiff, and service accepted. It also showed that a copy of the writ of error was received and filed by the clerk of the trial court, and while it is true that it did not show that the original writ of error was filed in his office, yet the affidavit made by the deputy clerk (which is not disputed) disclosed that it was so filed, and on the same day with the other proceedings for perfecting the transfer of the case to the Court of Appeals. Now, while it may be technically true, as said by the majority of the Court of Appeals, that the indorsement on the copy of the writ of error of its receipt for the benefit of the defendant in error, plaintiff below, was under section 1007 of the Revised Statutes, with a view to a supersedeas, and may not itself be sufficient evidence of the filing of the original writ, yet the affidavit of the deputy clerk, who had charge of the office, shows positively that it was left with him and filed. If it was left with him and he failed to indorse it as filed, can it be that his omission defeats the party's right to transfer the case to the appellate court? Is it within the power of a clerk to overrule the action of the Judge, and prevent an appeal or writ of error which he has allowed? When the Judge has done all that is necessary for him to do to perfect the transmission of the case to the appellate court, and the party seeking review has done all that is required of him, can it be that the omission of a clerk (if there was such an omission) can prevent the jurisdiction attaching to the appellate court? Obviously not. "When deposited with the clerk of the court, to whose Judges it is directed, it is served."

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Mussina v. *Cavazos*, 6 Wall. 355, 358. While we have always been careful to see that the required order of procedure has been complied with before any case shall be considered as transferred from a lower to a higher court, that the party seeking a review must act in time and must make a substantial compliance with all that the statute prescribes, at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of the defendant in error should be made available to oust the appellate court of jurisdiction. We are clear that upon the showing made the Court of Appeals had jurisdiction, and should have proceeded to dispose of the case upon its merits.

Coming now to the merits, many questions have been exhaustively discussed by counsel in brief and argument. One is, to what extent, if at all, the law of New York controls in respect to the policy sued on.

By the insurance company it is contended that it does not apply; that it operates only upon contracts of insurance consummated within the State of New York; that it commences "no life insurance company doing business in the State of New York shall have power," etc.; that it thus includes foreign as well as local insurance companies, and as it confessedly cannot control the operations or modify the contracts of foreign insurance companies made outside the State, the true construction is that it applies to both foreign and local companies only as to business done within the State; that as the application was signed by the insured in the State of Washington, and when received by the company in New York was there accepted only conditionally, and as the policy which was prepared and forwarded to an agent of the company in Washington contained an express stipulation that it should "not take effect until the first premium shall have been paid and the policy shall have been delivered," and as the premium was in fact paid and the policy delivered in the State of Washington, the contract was a Washington contract, and governed by the laws of that State and not by the laws of New York, *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226, 232; that the statement in the application signed by Phinney that it was made "subject

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to the charter of the company and the laws of New York," by its terms refers only to the application, and does not make the laws of New York controlling in reference to the terms of the contract, which was evidenced by the policy subsequently issued; and that being a Washington contract, and there being no legislation in that State in respect to matter of forfeiture, by its terms it became forfeited on the non-payment of the second annual premium.

On the other hand, it is contended by the executrix that, whatever may be the effect of the statute upon foreign companies which may happen to be doing business within the limits of New York, it is as to local companies practically a modification of their charters and a statutory rule thereafter controlling all contracts made by them, whether within or without the State; that even if this be not true, yet, as the policy refers to the application and makes it a part of the contract, and as there is no law of New York which affects in any way an application as such, the statement therein, that it is made subject to the charter of the company and the laws of New York, must be understood as directly incorporating the laws of New York into the contract, or at least referring to them as containing the rules for its construction and enforcement; and also, inasmuch as by its terms, final performance (that is, the payment of the policy) is to be made in New York, the law of the place of performance is the law which governs as to the validity and interpretation of the contract. *Washington Central Bank* v. *Hume*, 128 U. S. 195 197, 206; *Coghlan* v. *South Carolina Railroad*, 142 U. S. 101, 109, and cases cited in the opinion.

We are not insensible of the importance as well as the difficulty of the question thus presented in these various aspects, but think that the case may properly be disposed of without any consideration or determination thereof.

We shall assume, without deciding, that the law of New York does control in respect to this contract, and still are of the opinion that the judgment must be reversed for error occurring on the trial, and error of such a character as in view of the testimony may render it unnecessary ever to consider the question to which we have referred. Confessedly, the insured did not pay

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the annual premium due September 24, 1891, nor that due September 24, 1892, although he lived until September 12, 1893. It appears from the undisputed testimony that the insured knew when the premium became due in September, 1891. Twice he spoke to the local agent seeking to arrange for the payment of the premium by a note, and some three or four months thereafter he surrendered the policy to such agent. It is true that at the time of the surrender the agent told the insured that the policy was forfeited, or words to that effect, and that the insured said to him that as the policy had lapsed it was no good to him, and the agent might take it if he wanted it. But never thereafter until the time of his death, more than a year and a half, was anything done or said by the insured in respect to the policy; no suggestion of payment of premium or anything of any kind in respect to it. He treated the matter as abandoned, and gave up to the agent of the company the instrument by which the contract was evidenced. Further, after his death his widow, the plaintiff, filed an affidavit that the personal property of her husband's estate amounted only to $50,000, which, of course, was not true if she had a $100,000 policy in the defendant company. Not only that, she ignored the policy altogether for nearly ten months, although she promptly presented claims under other policies. As she testified that she knew of the existence of this policy her conduct is explainable only on the theory that she understood that, which the evidence affirms, her husband had abandoned the policy and surrendered it to the company. Upon these facts the defendant asked this instruction, which the court declined to give:

"If you find from the evidence in this case that the said Guy C. Phinney stated to the representative of the defendant in the State of Washington that he could not pay the premium falling due September 24, 1891, and that he did not pay nor tender the same, and that he thereafter surrendered said policy to the defendant's representative, they mutually believing and understanding that the same was of no force or validity then or thereafter, by reason of the non-payment of the said premium, this would constitute an abandonment and rescission of this contract by both parties thereto, and would put an end to the

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same; and if you find the facts so to be, you must find a verdict for the defendant."

In lieu thereof the court charged as follows:

"Now, it is contended that Mr. Phinney and this company, acting through Mr. Stinson as its agent, arrived at an understanding and agreement that the policy should not continue longer in force; Phinney was to pay no more money, and that his rights and the policy were abrogated. Notwithstanding the provision of the statute of New York, that a provision in the policy itself waiving notice has no effect, and that the company can only forfeit the policy for non-payment of premium by mailing the prescribed notice, still it would be competent, and it was competent, for the parties mutually to agree to the cancellation of a life insurance policy if they saw fit to do so. And if the evidence in the case shows that Mr. Phinney did voluntarily, without being induced by any false representations or deceit to give up the policy, rescind the contract and give up the policy rather than to continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy so that it would no longer be a continuing contract. There is testimony in the case tending to prove that Mr. Phinney was unable to meet the second payment when it fell due, and by reason of his failure to make that payment, he voluntarily delivered up the policy to Mr. Stinson as an agent of the company, with the understanding, expressed at the time, that it was lapsed, that it was no longer a continuing contract in his favor. If there was a full and fair understanding between these two men in that matter, and they both treated it as an abrogated and annulled contract, and each relied upon that understanding, it would have the effect to terminate the policy, and the company would have the right to consider itself absolved from any obligation to give the statutory notice in order to forfeit the policy, because it would be unnecessary for the company to forfeit by legal proceedings what the opposite party had voluntarily relinquished. It is a question of fact, therefore, for you to determine from the evidence in the case, whether there was a full, complete understanding and meeting of minds between Mr. Phinney and Mr. Stinson, and such an

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agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson, with an understanding, and whether relying upon that understanding the defendant company subsequently acted."

In view of the facts heretofore narrated, it is obvious not only that there was error in the action of the court in declining to give the instruction requested by the insurance company, and giving that which it did, but also that the error was material. The instruction given suggested a matter in respect to which there was no testimony, yet which, in view of other language in the charge, was quite sure to mislead. In reference to this matter of abandonment and rescission, the court in effect declared that it was binding, unless induced by false representation or deceit. There is not the slightest syllable in the testimony to suggest that the agent deceived the insured, nor that he made a false representation in the sense in which a false representation may avoid a contract. And yet, as the court had already ruled that the law of New York controlled, that there was no forfeiture until the notice prescribed by the statute of that State had been given, the jury must have understood that when the agent said that the policy had lapsed, he made a false representation, and, therefore, that the action of the insured, based upon that false representation, did not amount to an abandonment. But whether that statement of the agent was correct in matter of law is doubtful; whether true or false, or, more accurately, whether correct or not, in its interpretation of the law applicable to this contract, is immaterial. It was merely a statement of what he supposed the law was, and the insured was under the same obligations to know the law that the company, or its agent was. The jury evidently proceeded upon the supposition that the insurance company, located in New York, knew what the law of that State was; the insured, residing in Washington, did not, and when the agent stated what the condition of the contract was, he misrepresented the law of New York, of which the insured was ignorant, and, being ignorant, was not bound by any act based thereon in the way of abandonment or rescission. But surely no such rule as that obtains. When two par-

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ties enter into a contract, and make it determinable by the law of another State, it is conclusively presumed that each of them knows the law in respect to which they make the contract. There is no presumption of ignorance on the one side and knowledge on the other. Reverse the situation. Suppose the insurance company had made this contract as a Washington contract, and there had been some peculiar provision of that State controlling all contracts made within the State: could the company, a corporation of New York, thereafter be permitted to say that it did not know what the law of Washington was; that the insured, as a resident of that State, must be presumed to have known it; that he did not communicate his information, and therefore it was not bound by that law, and that if he said anything in reference to it, it was a case of false representation or deceit? No one would contend this. And so when these two parties, the insurance company and the insured, dealing as we are now supposing in a contract which they mutually agree should be determinable by the laws of New York, it is an absolute presumption that each knew those laws, and that neither one could be misled by any statement in respect thereto on the part of the other. Whatever opinion either might express in reference to those statutes, was a mere matter of opinion. He was chargeable with knowledge, just exactly as the insurance company was. *Sturm* v. *Boker*, 150 U. S. 312, is decisive of this question. In that case the statement of the insured as to a question of law was insisted upon as conclusive, but this court said (p. 336):

"Both the defendants and the insurance companies had the written contracts before them, and were presumed, as a matter of law, to know their legal effect and operation. What the complainant said in his testimony was a statement of opinion upon a question of law, where the facts were equally well known to both parties. Such statements of opinion do not operate as an estoppel. If he had said, in express terms, that by that contract he was responsible for the loss, it would have been, under the circumstances, only the expression of opinion as to the law of the contract, and not a declaration or admission of a fact,

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such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument.

"In *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326, 337, it was said: 'Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.'

"So in *Brewster* v. *Striker*, 2 N. Y. 19, and *Norton* v. *Coons*, 6 N. Y. 33, and approved in *Chatfield* v. *Simonson et al.*, 92 N. Y. 209, 218, where it was ruled 'that the assertion of a legal conclusion, where the facts were all stated, did not operate as an estoppel upon the party making such assertion.'"

So, whatever the local agent may have said as to the condition of the contract, was a mere expression of opinion as to a matter of law in respect to which both parties were equally chargeable with knowledge. It seems to us clear that only because of the inference to be drawn from the rejection of the instruction asked by the defendant, and the giving of the instruction with this suggestion of false representation or deceit, can the verdict of the jury be accounted for.

Nor can we think that the action of the defendant in requesting, after the jury had returned and asked certain questions, which were answered by the trial judge, that he repeat the instructions theretofore given in respect to waiver and abandonment, is to be taken as an indorsement of those instructions. After it had once excepted to the refusal of an instruction which it had asked, and excepted to those that were given, it did not lose the benefit of such exceptions by a request that the court repeat the instructions excepted to in connection with certain answers made to questions propounded by the jury. It meant simply that if the court answered, as it did, the questions propounded by the jury, it ought to supplement those answers with a restatement of the instructions theretofore given, and asking that restatement was not an admission that they were correct, but simply a request that they should be restated so as to qualify the answers given to the questions.

In this connection we may be permitted to suggest that no afterthought of ingenious and able counsel should be permitted to disturb the understanding and agreement of the parties based

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upon their belief as to what the law is, or to enforce a contract which both parties concluded to abandon.

A single further matter requires notice, and we mention it simply to indicate that we have considered, although we do not decide, the question involved therein: The contract of insurance is a peculiar contract, especially when made with a mutual insurance company, for although in terms a contract with a corporation it is in substance a contract between the insured and all other members of that company. The character of this contract was fully considered and discussed by this court in *New York Life Insurance Co.* v. *Statham*, 93 U. S. 24, and to that case we refer without quotation. Now, whether the insurance company, if the law of New York be applicable, could insist upon a forfeiture without giving the notice prescribed by the statutes of that State, and, enforcing it, forfeit all premiums paid, all obligation for the return of the surrender value, all right of the insured by subsequent payments to continue the policy in force, is one question. But it is a very different question whether the executrix of the insured, after his long delinquency in the payment of premiums, can enforce the contract as against the other insured parties, thereby diminishing their interest in the accumulated reserve. Ordinarily no one can enforce a contract unless on his part he performs the stipulated promise, and it may be that this rule is operative in this case. We do not care to decide the question, and only mention it for fear that it should be assumed we had overlooked it. It is a question which may never arise in the future litigation of this case, and until it necessarily arises we do not feel called upon to decide it.

For these reasons the judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States for the District of Washington are reversed, and the case remanded to the latter court with instructions to award a new trial.

MR. JUSTICE PECKHAM did not sit at the hearing and took no part in the decision of this case.

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MUTUAL LIFE INSURANCE COMPANY *v.* SEARS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 452. Argued March 14, 15, 1900.—Decided May 28, 1900.

In view of what has been already decided in *Mutual Life Insurance Company* v. *Phinney*, *ante*, 327, the court holds that it is needless to do more than note the fact that, as shown by the answer, after the insured had once defaulted in May, 1892, and a second default had occurred in May, 1893, application was made to him by the company, through its agents, to restore the policy, and that he declined to make any further payments or to continue the policy, and elected to have it terminated, which election was accepted by the company, and the parties to the contract treated it thereafter as abandoned, and that there is nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as any other contract; and if they choose to abandon it, their action is conclusive.

THIS, like the case of *Mutual Life Insurance Company* v. *Phinney*, *ante*, 327, just decided, is an action on an insurance policy issued by the company, the premiums on which were unpaid for years before the death of the insured. The facts, as disclosed by the pleadings, (and the case went off on the pleadings, without any testimony,) are that on May 18, 1891, the insurance company issued a policy to Stephen P. Sears, he being the beneficiary named in the policy as well as the insured. He paid the first annual premium and received the policy, but neglected to pay the premium due on May 18, 1892, and all subsequent premiums. He lived until March 30, 1898, and thereafter his widow, the plaintiff below, was appointed his executrix. The answer alleged non-payment of the premiums from 1892 onward, and also "that subsequent to the failure of the said Stephen P. Sears to make payment of the said annual premium falling due on said policy, May 18, 1893, and subsequent to the lapsing of said policy for failure to make said payment, and after the said Stephen P. Sears was fully informed and knew that said policy had been by it declared lapsed and

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void for non-payment of premium, this defendant, through its agents, applied to said Stephen P. Sears to make restoration of said policy by making payment of said defaulted premium and having the said policy restored to force, but that said Stephen P. Sears refused to make such payment and refused longer to continue said policy or make any further payments thereon, and then and there elected to have the same terminated, and this defendant, relying upon the said election and determination of said Stephen P. Sears, at all times subsequent thereto treated said policy as lapsed, abandoned and terminated, and relying upon the said conduct of said Sears, abstained from taking any further action or step in relation to said policy, by way of notice or otherwise, in order to effect the cancellation and termination thereof."

A demurrer to this answer was sustained and judgment entered for the plaintiff, which was affirmed by the Court of Appeals, 97 Fed. Rep. 986, and the case was thereupon brought to this court on certiorari.

Mr. Julien T. Davies and *Mr. John B. Allen* for petitioner. *Mr. Edward Lyman Short* and *Mr. Frederic D. McKenney* were on their brief.

Mr. Stanton Warburton and *Mr. Harold Preston* for respondent. *Mr. Eben Smith* was on their brief.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

In view of what has been already decided in the case of *Mutual Life Insurance Company* v. *Phinney, Executrix*, *ante*, 327, it is needless to do more than note the fact that, as shown by the answer, after the insured had once defaulted in May, 1892, and a second default had occurred in May, 1893, application was made to him by the company, through its agents, to restore the policy, and that he declined to make any further payments or to continue the policy, and elected to have it terminated, which election was accepted by the company, and the parties

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to the contract treated it thereafter as abandoned. As we held in the prior case, there is nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as any other contract, and if they chose to abandon it, that action is conclusive.

The judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States for the District of Washington are reversed and the case remanded to the latter court, with instructions to overrule the demurrer to defendant's answer.

MR. JUSTICE PECKHAM did not sit in the hearing and took no part in the decision of this case.

MUTUAL LIFE INSURANCE COMPANY *v.* HILL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 453. Argued March 14, 15, 1900. — Decided May 28, 1900.

This case falls within the same rule as *Mutual Life Insurance Co.* v. *Phinney*, *ante*, 327, and *Mutual Life Insurance Co.* v. *Sears*, *ante*, 345, and is disposed of in the same way.

THE case is stated in the opinion.

Mr. Julien T. Davies and *Mr. John B. Allen* for petitioner. *Mr. Edward Lyman Short* and *Mr. Frederic D. McKenney* were on their brief.

Mr. Stanton Warburton and *Mr. Harold Preston* for respondent. *Mr. Eben Smith* was on their brief.

MR. JUSTICE BREWER delivered the opinion of the court.

This case resembles the last two decided, in that it was an

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action against the insurance company on a policy whose premiums had not been paid for some years before the death of the insured. The policy was issued April 29, 1886, to George Dana Hill for the benefit of his wife, if living at the time of his death, and if not for the benefit of their children. The insured paid the first annual premium, but none thereafter. He died on December 4, 1890. His wife died before him, and this action was brought in behalf of the children. The answer alleged, among other things —

"That pursuant to the conditions of the said policy, there became and was due to the defendant as a premium upon said policy of insurance on the twenty-ninth day of April, A.D. 1887, the sum of eight hundred and fourteen ($814) dollars, and the said George Dana Hill and the said Ellen Kellogg Hill, his wife, and each and all of the plaintiffs herein failed, neglected and refused to pay to the defendant, at the time aforesaid, the said sum of eight hundred and fourteen ($814) dollars, or any part thereof, and ever since that time and up to the time of the death of the said George Dana Hill on the fourth day of December, 1890, the said George Dana Hill and the said Ellen Kellogg Hill, his wife, during her lifetime, and each and all of the plaintiffs, neglected and refused to pay to defendant the said sum or any part thereof, or any other sum or other thing of value whatever, by reason whereof the said policy of insurance became and was on the twenty-ninth day of April, A. D. 1887, according to the conditions aforesaid, void and of no effect.

"That at a time more than one year from the time of the issuance of the policy mentioned in the complaint, and during the lifetime of the said George Dana Hill mentioned in the complaint, it was mutually agreed between the defendant and the said George Dana Hill that the said contract of insurance should be waived, abandoned and rescinded, and the said George Dana Hill and the defendant then by mutual consent waived, abandoned and rescinded the same accordingly, and all their mutual rights and obligations therein and thereunder.

"This defendant alleges that the said plaintiffs, and each of them, should be, and are, estopped from, and should not be per-

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mitted to allege or prove that defendant did not mail, or cause to be mailed, or otherwise given, to said George Dana Hill a notice stating the amount of premium due on said policy on April 29, 1887, or at any other time, with the place where the same should be paid, the person to whom the same is payable, and stating that unless the premium then due should be paid to the company, or its agents, within thirty days after the mailing of such notice, the policy, and all payments made thereon, should become forfeited, or any other notice prescribed by any statute or statutes of the State of New York, or any other notice than that hereinafter in this paragraph mentioned, for that, shortly prior to and after, and on said twenty-ninth day of April, 1887, this defendant, in writing, and also personally, notified and informed the said George Dana Hill, at said city of Seattle, that the premium of eight hundred and fourteen dollars, necessary to be paid on said policy for the continuance of said policy of insurance, was due and payable, and said defendant duly demanded payment of said premium in said sum, and, at the same time and place, tendered the receipt of the defendant therefor, duly signed by its president and secretary; and the said Hill, being fully so informed and advised in the premises, refused to make payment of said premium, or any part thereof, and then and there, intending, and for the purpose of inducing defendant to rely upon the same, informed defendant that he, the said George Dana Hill, was unable to pay said premium, and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance, but, on the contrary, he, the said George Dana Hill, intended to allow the said policy to lapse and become forfeited for want of payment of said premium, or of any future premium accruing on said policy; and the said defendant, then and there, and ever since, relying upon the said representations and conduct on the part of the said George Dana Hill, was thereby induced to, and did, declare the said policy and contract of insurance forfeited and abandoned, and, in good faith, relying upon said conduct and representations on the part of said George Dana Hill, this defendant was induced to, and did, fail and abstain from giving or mailing any notice, whether prescribed by statute or other-

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wise, to the said George Dana Hill, or to any person interested in said policy, concerning the payment of any premium thereon."

Here, as in the last two cases, is disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy and all rights and obligations on the part of the parties thereto.

But it is said that the insured was not the beneficiary; his wife, and in case of her death, their children, being named as such; and that it was not in his power, by non-payment or waiver or abandonment, to relinquish or cancel her or their rights in the policy. It is doubtless an interesting question how far the action of the insured can affect or bind the beneficiaries in a life insurance policy. If the answer in this case contained simply the allegation in respect to the insured's agreement with the company, we should be compelled to enter into an examination of that question; but it is alleged, not only that the insured and the company agreed to abandon the contract, but also that the beneficiary, his wife, and the plaintiffs, their children, "failed, neglected and refused" to pay the premium. So we have a case in which not only did the insured and the company abandon the contract, but also the beneficiaries neglected and refused to do that which was essential to keep the policy in life. The allegation in the answer does not disclose a mere omission, for it is "neglected and refused," and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge or notice. The case, therefore, is one in which the beneficiaries refused to continue the policy, while the insured and the company abandoned it.

Under those circumstances we think the case falls within the same rule as the preceding; and the judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States for the District of Washington are reversed, and the case remanded to the latter court, with instructions to overrule the demurrer to defendant's answer.

Mr. Justice Peckham did not sit in the hearing and took no part in the decision of this case.

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MUTUAL LIFE INSURANCE COMPANY *v.* ALLEN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 455. Argued March 14, 15, 1900.—Decided May 28, 1900.

Mutual Life Insurance Company v. *Sears*, *ante*, 345, followed.

THE case is stated in the opinion.

Mr. Julien T. Davis and *Mr. John B. Allen* for petitioner. *Mr. Edward Lyman Short* and *Mr. Frederic D. McKenney* were on their brief.

Mr. Stanton Wartburton and *Mr. Harold Preston* for respondent. *Mr. Eben Smith* was on their brief.

MR. JUSTICE BREWER delivered the opinion of the court.

This case is, in all material respects, similar to that of *Mutual Life Insurance Company* v. *Bessie F. Sears, Executrix*, just decided. The answer of the company, which was demurred to, and the demurrer sustained, contained these allegations:

"That neither the said Samuel B. Stewart, nor any one on his behalf, ever paid, or offered to pay, any premium, or any part of any premium due, or to become due or payable on said policy, save and except the first premium, which was paid upon the delivery of said policy, and which covered the period from the date of said policy until the eighteenth day of February, 1894. That the said Samuel B. Stewart was at all times advised and informed that default had been made by him in the payment of each and every premium, and the whole thereof, due on said policy, subsequent to the said first annual premium paid at the delivery of said policy; and that the said Samuel B. Stewart in his lifetime never paid or offered to pay any pre-

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mium, or any part of any premium, due upon said policy subsequent to that paid upon the delivery thereof as aforesaid. That it was expressly in said policy provided that the insurance thereon was payable to the insured, Samuel B. Stewart, or his assigns; that the said Samuel B. Stewart never made any transfer or assignment of said policy of insurance; that the said defendant entered and noted said policy of insurance upon its books as forfeited and lapsed for failure to pay the annual premium falling due on said policy on said eighteenth day of February, 1894. That the said Samuel B. Stewart was at all times advised that defendant had so treated said policy as lapsed and forfeited, and notwithstanding said notice, and notwithstanding the said Samuel B. Stewart was at all times advised, he had not paid the premium due on said policy February 18, 1894, consented to the forfeiture and termination of said policy of insurance; and with a mutual knowlege and understanding on the part of defendant and said Samuel B. Stewart, the said policy was at all times by the said parties deemed terminated from and after the eighteenth day of February, 1894; and relying upon such knowledge and mutual understanding, the said defendant never subsequently mailed or served any notice of the due date of premiums to or upon said Samuel B. Stewart during his lifetime, and the said Samuel B. Stewart, at all times knowing that the defendant was treating said policy as forfeited and lapsed, and at all times knowing that he had not paid or tendered payment of any premium upon said policy subsequent to the first annual premium paid as aforesaid on the delivery of said policy, acquiesced in and agreed to the said mutual understanding that the said policy was lapsed and forfeited, and by mutual agreement and consent both the said defendant and said Samuel B. Stewart agreed and consented to the lapsing and forfeiture of said policy of insurance from and after the eighteenth day of February, 1894."

From this answer it distinctly appears that Stewart, who was both the insured and the beneficiary, knew when the second annual premium became due, was informed of his default in the matter of payment, and both he and the company agreed to

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the ending of the contract. Under these circumstances, and without considering any other question,

The judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States for the District of Washington are reversed, and the case remanded to the latter court with instructions to overrule the demurrer to the answer of the defendant.

MR. JUSTICE PECKHAM did not sit in the hearing and took no part in the decision of this case.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY v. CLARK.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 256. Argued April 20, 23, 1900.—Decided May 28, 1900.

The record shows that the cause came on for trial without a jury, a trial by jury having been expressly waived by written consent of the parties, that a referee was duly appointed by similar consent, in accordance with the rules and customs of the District in which the trial was had, and that his findings, rulings and decisions were made those of the court. *Held*, that the question whether the judgment rendered was warranted by the facts found was open for consideration in the Circuit Court of Appeals, and is so here.

Clark contracted with the railway company for the construction of part of its road. He also contracted for the completion of his work on a day named. It was not completed till some time after that day. Clark contended that the failure was caused by the neglect of the company to procure a right of way. When the time for settlement came there were also other disputes between him and the company, which are set forth in detail in the statement of facts. The result was that Clark signed a paper in which, after stating the disputed claims in detail, it was said: "Now therefore be it known that I, the said Heman Clark, have received of and from the said Chicago, Milwaukee and St. Paul Railway Company, the sum of one hundred and seventy three thousand, five hundred and thirty

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Statement of the Case.

two and $\frac{42}{100}$ dollars, in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from or growing out of said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of said railway company to account for said forty thousand dollars, as herein provided." This paper after signature was given by him to the railway company, and in return they gave him a check for the balance named. Five years and more after this transaction this action was brought to recover the disputed claims. *Held*, that Clark was barred by his release from recovering the disputed sums.

The rule laid down in *Cumber* v. *Wane*, 1 Strange, 426, that where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such for want of consideration, has been much questioned and qualified, and is considered so far with disfavor, as to be confined strictly to cases within it.

HEMAN Clark constructed some two hundred miles of railroad in the States of Iowa and Missouri, for the Chicago, Milwaukee and St. Paul Railway Company, under a written contract dated March 6, 1886, which is set forth in the findings hereafter referred to. During the period of construction the company paid Clark large sums of money on account. After the road was completed the Chief Engineer of the company, as was his duty under the contract, certified to the total amount that Clark had earned under the contract. This amount was $3,895,798.79. But Clark claimed also the further sum of $34,598.90 for material sold by him to the company, and certain rebates and other matters of that description, which would make the aggregate $3,930,397.69. As to the amount that should be credited to the company, the company claimed credits to the amount of $3,716,865.20, while Clark contended that the total amount that should be credited was $3,667,306.59, or $49,558.63 less than the amount claimed by the company. This latter amount was made up of two items: one of $40,000, for overtime forfeiture or penalty, and the other of $9558.63, the amount paid by the company for nut locks furnished to Clark, and used by him in the construction of the road. The company prepared an account stated, which allowed the $34,598.90, on one side of the account, and included the $40,000 and the $9558.63, on the other, and appended to it a release for Clark to sign, if he accepted the balance therein stated. The account

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stated and release were sent to him with notice that upon signing and returning the same to the Vice President of the company, a check for the balance shown by the account to be due would be sent to him. Immediately thereupon, on March 9, 1888, the account and release were returned by Clark to the Vice President, signed and witnessed, and a check for the full amount of such balance, $173,532.29, was at once delivered to Clark, who indorsed and deposited it in his bank, and received the proceeds thereof.

August 5, 1893, Clark commenced this action against the railroad company to recover amounts which he claimed to be due him on account of the construction of the road, and for extra work and other claims growing out of the contract. The complaint originally contained three causes of action, but by amendment the number was increased to six. The second, third, fourth and sixth causes of action, and part of the first cause, were eliminated from the case by the judgment, and Clark recovered on the two items of $40,000 and $9558.63 under the first cause of action, and also under the fifth cause for $2425, a matter arising subsequent to the release, and not included within it.

The action was originally brought in the state court, but was removed on the application of the company to the Circuit Court of the United States for the Southern District of New York. After issue was joined, the cause came on for trial at a regular term of the Circuit Court. Trial by jury was waived by written consent of the parties, filed with the clerk, and the cause was referred to a referee, who in due time made his report and findings. The court adopted the findings of the referee and ordered judgment thereon for the sum of $80,479.35. This judgment was subsequently affirmed by the Circuit Court of Appeals. 92 Fed. Rep. 968.

The findings of fact and conclusions of law of the referee were as follows:

"Findings of Fact.

"1. That in the month of March, 1886, the defendant, the Chicago, Milwaukee and St. Paul Railway Company, made and entered into a contract in writing with the plaintiff, dated the

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6th day of March, 1886, for the construction of a line of railroad from a point in the city of Ottumwa, Iowa, to a place called Harlem Station, in the State of Missouri, a distance of about 202.8 miles, to be completed on the first day of August, 1887, a copy of which contract is hereto annexed, marked 'A.'

"2. That immediately after the execution of the said contract the plaintiff proceeded to carry out and perform the same, and did carry out and perform the same, except a portion thereof otherwise agreed between the parties, and substantially completed the same on or about the 1st day of November, 1887, and the same was duly accepted by the defendant on or about the first day of March, 1888.

"3. That on or about the third day of March, 1888, the Chief Engineer in charge of said work under said contract made a final certificate and estimate, which is copied in full in the twentieth and twenty-first finding of fact last asked by the defendant, and by this reference is made part hereof.

"4. That said certificate and estimate were delivered to the defendant, but were never delivered to the plaintiff or any of his agents, and were not seen by the plaintiff or any of his agents or brought to his knowledge otherwise than by the reference thereto in the receipt of March 9, 1888, hereinafter referred to, until the trial of this action.

"5. That the consideration for the performance of said contract originally mentioned in said contract was $3,914,600, but before the execution of said contract by the plaintiff, by and with the consent of the defendant, the consideration was changed and made $3,954,600.

"6. That the plaintiff made and entered into a supplemental contract whereby he agreed with the defendant to complete his performance of said contract on or before June 1, 1887, and to allow the said defendant, by way of forfeiture, in case the said railway were not so completed by the 1st of June, 1887, the sum of $40,000.

"7. That the defendant failed to furnish the plaintiff with rights of way as by said contract it had agreed to do in time to enable the plaintiff to complete his contract prior to the 1st of June, 1887, or prior to the 1st of August, 1887, but on the con-

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trary, delayed the plaintiff in the performance of said contract at a point upon the said road known as Minneville until October 27, 1887, by reason of the neglect, failure and omission of the defendant to obtain the necessary right of way at said point so as to permit the construction of the road and completion of the contract at said point.

"8. That the plaintiff was thereby prevented from completing his contract on or prior to August 1, 1887, and also on or prior to June 1, 1887, by the negligence, omission and fault of the defendant.

"9. That during the progress of the work the defendant purchased and furnished to the plaintiff and charged him for patented nut locks, for which the defendant paid $9558.63.

"10. That the said nut locks so furnished by the defendant were used by the plaintiff in the construction of the road.

"11. That there are no provisions in the contract which require that the plaintiff, and the plaintiff never agreed, that he should use in the construction of the railroad under said contract, any patented nut locks.

"12. That the plaintiff was ordered by the defendant to put such nut locks on the road at the beginning of the work. That he protested against their use, and finally yielded and used them in track laying upon the promise that the matter of the charge for said nut locks should be adjusted after the completion of the contract.

"13. That upon the 9th day of March, 1888, the plaintiff signed and caused to be delivered to a representative of the defendant a paper, writing or receipt presented to him by the defendant for signature, of which the following is a copy; and upon the signature thereof by said Clark, and its delivery by him to the defendant, the plaintiff was paid by the said defendant the said sum named therein of $213,532.49, less the sum of $40,000 claimed in said paper to be retained for forfeiture in not completing performance of his work under said contract on or prior to June 1, 1887, and the sum of $3,626,865.20 included therein embraces said sum of $9558.63 claimed by defendant to be due for nut locks. Said $40,000 was deducted, and the actual amount so paid was $173,532.49.

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"Whereas, a final estimate has been made by D. J. Whittemore, Chief Engineer of the Chicago, Milwaukee and St. Paul Railway Company, of all the work done and material furnished under the contract made between said railway company and Heman Clark, bearing date March 8, 1886, for the construction of the railroad from Ottumwa, in Iowa, to the Missouri River, including all extra work performed and material furnished of every kind and description, which estimate, with the prior monthly estimates, less deductions made for work not done and work assumed by said company, amounts to $3,895,798.79;

"And whereas, the further sum of $34,598.90 should be credited to said Clark for materials sold by him to said company, and certain rebates and other matters of that description, making, with the amount of said estimates, the sum of $3,930,397.69;

"And whereas, the said Chicago, Milwaukee and St. Paul Railway Company has paid the said Clark to apply on said contract, in money, material, labor and transportation, the sum of $3,626,865.20;

"And whereas, by the terms of section 4, article 13, of said contract, said Clark was to be charged in addition for transportation the sum of $50,000;

"And by a supplemental contract was to allow the said railway company, by way of forfeiture in case said railway was not completed by the first day of June, 1887, the further sum of $40,000;

"Making the amount paid on said contract, together with the allowance of said transportation and the allowance of said forfeiture, the sum of $3,716,865.20;

"Leaving the amount still due said Clark on said contract, the sum of $213,532.49;

"And, whereas, in and by said contract it was provided that the said Heman Clark, party of the first part, should save the said railway company free and harmless from all claims that might be made against said railway company for liens of workmen and claims of sub-contractors, and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for cattle or other domestic

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animals killed or injured, and from all damages suffered by said sub-contractors and employés while engaged upon said work, of which said class of claims, about $40,000 in amount, have been made upon and are now pending in courts by divers claimants against said railway company, and the sum of $40,000 of the amount so due, as aforesaid, under said contract to the said Heman Clark, has been reserved and set aside by said railway company, as indemnity or security for the payment of said claims and of such other claims of the same class as hereafter may be made, in case said claimants, or any of them, recover judgments against said railway company, and the said $40,000, or the balance thereof, after paying and settling such claims as may be established against said railway company, is to be paid over to the said Heman Clark as soon as said claims are satisfied or said railway company suitably indemnified from any loss on account of the same, which $40,000 deducted from the sum of $213,532.49, so, as aforesaid, due said Clark, leaves due and owing by said railway company and now payable on said contract to said Heman Clark, the sum of $173,532.49:

"'Now, therefore, be it known, that I, the said Heman Clark, have received of and from the said Chicago, Milwaukee and St. Paul Railway Company the sum of one hundred and seventy-three thousand five hundred and thirty-two and $\frac{49}{100}$ dollars ($173,532.49), in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from, or growing out of, said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of said railway company to account for said forty thousand dollars, as hereinbefore provided.

"'Heman Clark.

"'Wm. C. Edwards.'

"14. That said receipt and paper contained an accurate, truthful and undisputed account of all dealings between said parties except in the matter of the $40,000 deducted for time forfeiture, the $9558.63 for nut locks embraced in the $3,626,865.20, and the lumber hereinafter referred to, and herein valued at

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$2425. Besides the above, the defendant has paid the $40,000 reserved as indemnity or security for the payment of claims against Clark, and in addition thereto upon like accounts, the sum of $521.75.

"15. That at the time of the signing and delivery of said last-mentioned paper the final certificate or estimate of the Chief Engineer under the contract had not been delivered to the plaintiff or any of his agents by the defendant or the said Engineer, and the contents thereof were not known to the plaintiff, other than by the reference thereto contained in said receipt of March 9, 1888.

"16. That no other final settlement of the accounts under said contract had been had between the plaintiff and the defendant at the time that the last-mentioned paper was signed and delivered.

"17. That at the time of the signing and delivery of said last-mentioned paper, the question of the liability of the plaintiff for nut locks, which had been left by the parties to this action open for settlement and adjustment until after the completion of the work under said contract, and had been referred by the defendant to the Chief Engineer under the said contract; had not been passed upon by him; that the said Chief Engineer had referred the question for the opinion of the defendant's counsel, who had not at said time given his opinion in relation thereto.

"18. That no account was ever, otherwise than by said paper and the receipt of said money, stated of the transactions under and connnected with said contract between the plaintiff and the defendant.

"19. That, in or about the months of March and April, 1888, the plaintiff was the owner of 97,000 feet B. M. bridge timber then in the yard of the defendant at Chillicothe and along the line of the railroad.

"20. That the said lumber did not conform to the standard of the defendant, and was not purchased by the defendant from the plaintiff, or allowed in the final certificate of the Chief Engineer, under the contract in this section to the plaintiff.

"21. That, in and about the month of June, 1888, the de-

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fendant took possession of the said lumber and converted the same to their own use without assent or knowledge of the plaintiff.

"22. That the value of the said lumber at the time of the taking, in June, 1888, was $2425."

"Conclusions of Law.

"1. That the defendant is not entitled to charge the plaintiff, or to retain and deduct from the amount earned and payable to the plaintiff under the said contract the sum of $40,000 as a forfeiture or liquidated damages for not completing the contract upon June 1, 1887.

"2. That under the facts proved in this case, the plaintiff is not legally liable to the defendant for any damages for failure to complete the contract within the contract time or the time agreed upon, for the reason that the plaintiff was prevented by the negligence of the defendant and its omission to procure the necessary right of way, from completing the said work in such time.

"3. That the plaintiff is not liable to the defendant for the sum of $9558.63, the cost of patent nut locks furnished by the defendant to the plaintiff and used by him in the performance of the said contract.

"4. That there was no obligation imposed by the contract upon the plaintiff to furnish and pay for patent nut locks to be used in the construction of the said road.

"5. That the plaintiff is not legally indebted to the defendant in any sum whatever for patent nut locks furnished by the defendant and used in the construction of the railroad under said contract.

"6. That the plaintiff is entitled to recover from the defendant the sum of $2425, with interest from June 1, 1888, for the conversion by the defendant of lumber belonging to the plaintiff.

"7. That the signing and delivery by the plaintiff of the receipt on or about the 9th day of March, 1888, and the acceptance of the check of $173,532.49, under the facts and circumstances proved in this case were, as to the two sums of $9558.63, charged for nut locks, and $40,000 charged by way of forfeiture for non-

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performance in time, wholly without consideration, and in violation of the contract between the parties, and do not constitute any bar to the recovery of the plaintiff for the sums of $9558.63 and $40,000 otherwise as due under the contract.

"8. That the signing and delivery of said receipt, and the acceptance of the check thereunder, do not constitute a legal payment or accord and satisfaction of the said sums of $9558.63 and $40,000, or either of them, or any part or either of them.

"9. That no account of the transactions under this contract, and of the claims sued on in this action, was ever had or stated between the parties to this action, otherwise than by said receipt or paper of March 9, 1888.

"10. That the plaintiff is entitled to recover the amount certified by the Chief Engineer of $3,895,793.79 without the deduction claimed by the defendants for nut locks of $9558.63, and without allowance to the defendant by way of forfeiture for non-completion of the railway on the 1st day of June, 1887, said sums together amounting to $49,558.63 with interest from March 9, 1888, and is also entitled to recover for timber used by the defendant on the 30th day of June, 1888, to the amount of $2425 with interest from June 30, 1888, the whole amounting at the date of this report, viz., the 4th day of December, 1897, to the sum of $81,305.88, for which with interest from this date and disbursements the plaintiff is entitled to judgment, less amount paid by the defendant in excess of the reserved $40,000, $521.75, with interest from and to the same date, being in all this day $826.53.

"There will be judgment, therefore, for the plaintiff for $80,479.35 with interest and costs, interest to be computed from December 4, 1897."

In addition to the foregoing findings of fact, twenty-seven additional findings of fact were made at the request of defendant. They related to, or set forth, the execution of the contract for the construction of the road; a supplemental agreement by which the sum of $40,000 was to be deducted from the contract price if the road was not completed by June 1, 1887; the failure of Clark to complete the road in that time; the final estimate and certificate of the Chief Engineer of the company;

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Counsel for Parties.

the sending of the statement of account and release to Clark, with the information that, on the same being signed and returned by him, a check for the balance due him, $173,549, would be sent to him; the return of said statement and release signed by Clark, and the sending to him of a check for such balance, March 9, 1888; the deposit by Clark of said check and his retention of the amount paid him thereon; the expenditure of the $40,000, (and the $521.75 besides,) reserved by the company, with Clark's consent, at the time of the settlement, to meet unpaid claims against Clark, incurred in the construction of the road; the furnishing of nut locks to Clark by the company for the construction of the road; and that the company did not require Clark to furnish any material or perform the work of furnishing or erecting any structures of a more expensive design than required of him by the contract for the construction of the road, otherwise than as set forth in the final estimate of the Chief Engineer.

Amendments to the complaint were allowed by the referee over defendant's objection and exception, and approved by the court under like objection and exception.

The errors assigned were that: (1) The court below erred in holding that the findings of fact supported the judgment as to the item of $9558.63 for nut locks, and the item of $40,000 for time forfeiture; (2) the court below erred in holding that there was no consideration for the settlement made by the parties as to the items of $9558.63 for nut locks, and $40,000 for time forfeiture; (3) the court below erred in holding that the question whether there was any evidence in the record to sustain the finding that the defendant in June, 1888, wrongfully took possession of certain lumber and converted it to its own use was not reviewable; (4) the court below erred in holding that it was proper to allow plaintiff to amend his complaint on the trial against defendant's objection, by adding thereto an action sounding in tort and to recover thereon.

Mr. Burton Hanson for the Railway Company. *Mr. George R. Peck* was on his brief.

Mr. L. Laflin Kellogg for Clark. *Mr. Alfred C. Petté* was on his brief.

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MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

The record shows that the cause came on before the District Judge, holding the Circuit Court, for trial, "without a jury, and a trial by jury having been expressly waived by the written consent of the parties duly filed;" that a referee was appointed by written consent in accordance with the modes of procedure in such cases in the courts of record of New York, and with the rules of the Circuit Court; and that his findings, rulings and decisions were made those of the court. Under these circumstances the question whether the judgment rendered was warranted by the facts found was open for consideration in the Circuit Court of Appeals, and is so here, and that is sufficient for the disposition of the case. *Shipman* v. *Mining Company*, 158 U. S. 356.

By the writing executed and delivered by him, March 9, 1888, Clark acknowledged the receipt of $173,532.49 "in full satisfaction of the amount due me on such estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from, or growing out of such contract of March 6, 1886, and of the construction of said railroad," excepting an item not material here. Five years and nearly five months after the receipt of the money and the execution and delivery of the discharge, this action was instituted. There was no finding or contention that the settlement was procured by fraud, or duress, or was the result of mutual mistake; nor was there any finding that Clark did not have full knowledge of all the facts at the time he signed and delivered the release, and the presumption was that he had such knowledge. But the proposition is that the release was given without consideration, and that Clark was entitled to recover so far as the items of $40,000 and $9558.63 were concerned, on the principle that where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such for want of consideration. *Cumber* v. *Wane*, 1 Strange, 426. The rule therein laid down has been much questioned and qualified. *Goddard* v. *O'Brien*, 9 Q. B. Div. 37;

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Sibree v. *Tripp*, 15 M. & W. 23; *Couldery* v. *Bartrum*, 19 Ch. D. 394; *Foakes* v. *Beer*, 9 App. Cas. 605; Notes to *Cumber* v. *Wane* in Smith's Leading Cases, vol. 1, 606; 12 Harvard Law Review, 521.

The result of the modern cases is that the rule only applies when the larger sum is liquidated, and when there is no consideration whatever for the surrender of part of it; and while the general rule must be regarded as well settled, it is considered so far with disfavor as to be confined strictly to cases within it.

In *Johnston* v. *Brannan*, 5 Johns. 268, 271, it was referred to as "that rigid and rather unreasonable rule of the old law;" and in *Kellogg* v. *Richards*, 14 Wend. 116, where the acceptance of a promissory note of a third party for a less sum was held to be a good accord and satisfaction, Mr. Justice Nelson, then a member of the Supreme Court of New York, said: "It is true there does not seem to be much, if any, ground for distinction, between such a case and one where a less sum of money is paid and agreed to be accepted in full, which would not be a good plea. . . . The rule that the payment of a less sum of money, though agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical, and not very well supported by reason. Courts therefore have departed from it upon slight distinctions."

So in *Brooks* v. *White*, 2 Metcalf, 283, the Supreme Judicial Court of Massachusetts said that: "The foundation of the rule seems therefore to be, that in the case of the acceptance of a less sum of money in discharge of a debt, inasmuch as there is no new consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate, with legal impunity, his promise to his debtor, however freely and understandingly made. This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import; and whenever a technical reason for its application does not exist, the rule itself is not to be applied. Hence judges have been disposed to take out of its application all those cases where there was any new consideration, or any collateral bene-

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fit received by the payee, which might raise a technical legal consideration, although it was quite apparent that such consideration was far less than the amount of the sum due."

To same effect, Ranney, J., in *Harper* v. *Graham*, 20 Ohio, 105; *Jaffray* v. *Davis*, 124 N. Y. 164; *Smith* v. *Ballou*, 1 R. I. 496; *Mitchell* v. *Wheaton*, 46 Conn. 315; *Seymour* v. *Goodrich*, 80 Va. 303.

In some of the States the contrary rule has been established by statute. Ala. Code, § 2774, c. 10; Cal. Civ. Code, § 1524; Georgia Code, § 3735; Maine Rev. Stat. c. 82, § 45; N. Car. Code, § 574, c. 7, art. 5; Tenn. Code, 1884, § 4539, c. 3, art. 4; Va. Code, 1887, c. 134; *Weymouth* v. *Babcock*, 42 Maine, 42; *Memphis* v. *Brown*, 1 Flippin, 188; *McArthur* v. *Dane*, 61 Ala. 539.

The findings of fact bearing on the items of $40,000 for forfeiture, and $9558.63 for nut locks, exclude any other inference than that there was a dispute between the parties in respect to those items as to the facts on which the claim for their allowance was based. This being so, it is insisted that the total balance of $223,091.02, (as it would have been if $9558.63 had not been deducted,) cannot be held to have been liquidated as a whole, that is, agreed upon by the parties or fixed by operation of law, and that the contention cannot be sustained that where there is a dispute as to an aggregate amount due, and the debtor offers to pay so much thereof as he concedes to be correct, and the creditor accepts, is paid and releases, nevertheless the creditor can afterward assert the disputed part of his claim on the ground that he has only received what was undeniably due him.

In *United States* v. *Bostwick*, 94 U. S. 53, 67, it was said that: "Payment by a debtor of a part of his debt is not a satisfaction of the whole except it be made and accepted on some new consideration;" while in *Baird* v. *United States*, 96 U. S. 430, it was held that if the debt be unliquidated and the amount uncertain, this rule does not apply. "In such cases the question is whether the payment was in fact made and accepted in satisfaction."

In *Fire Insurance Association* v. *Wickham*, 141 U. S. 564, 577, Mr. Justice Brown stated the doctrine thus: "The rule is

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well established that where the facts show clearly a certain sum to be due from one person to another, the release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a *bona fide* dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

In this case it cannot be said that at the time the release was executed there was no good reason to doubt that these items were open to dispute. The good faith of the company in claiming their allowance is not impugned, and as Judge Lacombe said: "Both items were legitimate matters of dispute, and unless settled by agreement of parties, might fairly be brought by either party into court."

And the cases are many in which it has been held that where an aggregate amount is in dispute, the payment of a specified sum conceded to be due, that is, by including certain items but excluding disputed items, on condition that the sum so paid shall be received in full satisfaction, will be sustained as an extinguishment of the whole.

In *Fuller* v. *Kemp*, 138 N. Y. 231, where certain items of an account were disputed, and certain items were undisputed, and defendant paid plaintiff only the amount of the undisputed items, the court held that the dispute over certain of the items made the account an unliquidated one, and that plaintiff, by accepting the amount of the undisputed items with notice that it was sent as payment in full, was precluded from recovering the balance of his demand.

Nassoiy v. *Tomlinson*, 148 N. Y. 326, 330, is to the same effect, and the court said: "A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper

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amount, the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction."

In *Ostrander* v. *Scott*, 161 Ill. 339, plaintiff had an account against defendant amounting to $5282.58, the items of which were not in dispute, but defendant claimed that he was entitled to be allowed the sum of $1210 for commissions, and accordingly he sent his check for the difference to plaintiff, at the same time notifying him that it was sent in settlement of his account in full, and if not accepted as such to return it. The check was retained by plaintiff, and he afterwards brought suit against defendant to recover the amount withheld, but the Supreme Court of Illinois held that there could be no recovery, and that an account cannot be considered as liquidated, so as to prevent the receipt of a less amount as payment from operating as a satisfaction, where there is a controversy over a set-off and the amount of the balance.

In *Tanner* v. *Merrill*, 108 Mich. 58, plaintiff sought to recover a sum which had been deducted from his wages by defendants, his employers. The amount of his wages was not disputed, but the right to make any deduction was questioned. Plaintiff received the amount of his wages less the deduction, and gave a receipt in full, and afterwards brought suit to recover the balance on the ground that, having only received the amount admitted to be due, there was no consideration for the release as to that which was disputed. The Supreme Court of Michigan held that the plaintiff could not recover, and that the rule that a receipt of part payment to be effective in the discharge of the entire debt must be rested upon a valid consideration, is limited to cases where the debt is liquidated by agreement or otherwise; that a claim any portion of which is in dispute cannot be considered to be liquidated within the meaning of the rule; and that a receipt in full, given upon payment of the undisputed part of the claim, after a refusal to pay another part which is disputed, is conclusive as against the right of the creditor to recover a further sum, in the absence of mistake, fraud, duress or undue influence.

Without analyzing the cases, it should be added that it has

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been frequently ruled by this court that a receipt in full must be regarded as an acquittance in bar of any further demand in the absence of any allegation and evidence that it was given in ignorance of its purport, or in circumstances constituting duress, fraud or mistake. *De Arnaud* v. *United States*, 151 U. S. 483; *United States* v. *Garlinger*, 169 U. S. 316, 322; *United States* v. *Adams*, 7 Wall. 463; *United States* v. *Child*, 12 Wall. 232; *United States* v. *Justice*, 14 Wall. 535; *Baker* v. *Nachtrieb*, 19 How. 126.

The general principle applicable to settlements was thus expressed by Mr. Justice Clifford, in *Hagar* v. *Thomson*, 1 Black, 80, 93: "Much the largest number of controversies between business men are ultimately settled by the parties themselves; and when there is no unfairness, and all the facts are equally known to both sides, an adjustment by them is final and conclusive. Oftentimes a party may be willing to yield something for the sake of a settlement; and if he does so with a full knowledge of the circumstances, he cannot affirm the settlement, and afterwards maintain a suit for that which he voluntarily surrendered."

But apart from the controversy over the two items of $40,000 and $9558.63, which was composed by the release, there was an item of $34,558.90 credited to Clark in the final account, the allowance of which, the company contends, furnished ample consideration therefor, although the adequacy of the consideration is not, in such cases, open to inquiry.

The referee found: "That no other final settlement of the accounts under said contracts had been had between the plaintiff and the defendant at the time the said last-mentioned paper was signed and delivered." "That no account was ever, otherwise than by said paper and the receipt of said money, stated of the transactions under and connected with said contract between the plaintiff and the defendant;" and also as a conclusion: "That no account of the transactions under this contract, and of the claims sued on in this action, was ever had or stated between the parties to this action, otherwise than by said receipt or paper of March 9, 1888." The release in question allowed to Clark, that is, debited the company with, the sum of $34,598.90,

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"for materials sold by him to said company, and certain rebates and matters of that description;" and charged Clark, that is, credited the company, with $40,000 by way of forfeiture, and $9558.63 for nut locks. It was in this respect, in effect, a statement of cross-demands. The $40,000 was specifically described and the $9558.63 was included in the total credits stated.

That this contractor, carrying on the work of building two hundred miles of railroad, and receiving payments on vouchers from time to time, must have been aware from his own books and papers that the $9558.63 was thus included, can hardly be reasonably denied, especially as he had objected to being charged with it. Indeed we do not understand that there is any suggestion that Clark was ignorant of any part of the account.

As to the $34,558.90, it appears from the contract, and final certificate and estimate, which are set forth in the principal or additional findings, that this item represented no part of the work specified under the contract, nor extra work, nor materials ordered by the company, and that it was not included in the contract or in the certificate and final estimate.

As was said by Lacombe, J., who delivered the principal opinion below: "Indeed it is plain to a demonstration from the findings, that the item in question was not included either in the original contract or in the extra work, and must represent an additional and independent contract of sale." And the learned judge further said: "From what has been said before, it is plain that, if at the time of the transactions relied upon as showing an accord and satisfaction, this sum of $34,598.90 so allowed to claimant represented an unliquidated item, the amount of which he would have to establish by evidence in case he had sued to recover it, its allowance to him upon the settlement of March 9, 1888, would be a sufficient consideration to uphold that settlement against him as an accord and satisfaction of all his claims." There was no finding that this amount had ever been agreed upon or liquidated by the parties in a manner that would have entitled Clark to have recovered the amount from the company as an independent item, otherwise than by the statement of it in the account preceding, and which formed a part of the receipt and acknowledgment of satisfac-

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tion which Clark executed and delivered to the company March 9, 1888. Nor was there any finding showing, or tending to show, that the company would have placed that sum to Clark's credit except as an item in an account which credited the company with the two charges for nut locks and forfeiture.

But the Circuit Court of Appeals held that because of the fourteenth finding of fact, it must be assumed that the referee was satisfied from the testimony, though he did not so find in terms, that the prior transactions between the parties were such that this sum of $34,558.90 was as much liquidated as was the sum of $3,895,798.79, to which the Chief Engineer had certified. Judge Lacombe said, referring to this particular item and to the fourteenth finding of fact: "By what process it was so liquidated does not appear in the findings. We must take his finding, therefore, as conclusive upon the question, and assume that either by an agreement for price in advance, or subsequently by entering into some binding agreement as to the sum to be paid, the defendant had lost the right to throw the plaintiff into court as to that item."

The fourteenth finding of fact was "that said receipt and paper contain a correct, truthful and undisputed account of all dealings between said parties except in the matter of the $40,000 deducted for time forfeiture, the $9558.63 for nut locks embraced in the $3,626,865.20, and the lumber hereinafter referred to, and herein valued at $2425." If this finding means that the statement of account was incorrect, untruthful and disputed as to the two items, it does not affirmatively say so, and if construed as amounting to that, it was not found that Clark did not have full knowledge thereof at the time he received the money and made the settlement. If it means that the statement of account as to these items was disputed, then the contention is a reasonable one that such dispute was a sufficient consideration to support the settlement in its entirety. But we must decline to accept the view that because of this finding it should be assumed, without any finding to that effect, that there had been prior transactions between Clark and the company, by which the item of $34,558.90 was liquidated, for it is explicitly declared by the referee that no account of the transactions

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under the contract, and of the claims sued on in this action, was ever had or stated between the parties, otherwise than by the paper of March 9, 1888. The value of the materials, rebates and other matters covered by this item may not have been disputed, but it did not follow that the company was obliged to purchase the materials or to allow the rebates, or that the amount thereof had been previously agreed to; nor that liability therefor might not have been contested if Clark had declined to sign the proposed acknowledgment of satisfaction. We must remember that Clark knew all about the account; he knew what the company claimed, and what he claimed, yet he accepted the check and signed the release without even a protest.

The word "liquidated" is used in different senses, and as applicable here means made certain as to what and how much is due; made certain by agreement of parties or by operation of law. We are of opinion that it would be going altogether too far to treat the fourteenth finding, segregated from the others, as equivalent to a determination that the $34,558.90 had been liquidated independently of the whole account as stated.

And, on the face of the findings, we think the credit in Clark's favor, taken in connection with the credits in the company's favor, put this adjustment beyond the reach of this belated attempt to overhaul it, and that Clark was barred by his release from recovering in this action the $40,000 and the $9558.63, as having been improperly deducted.

As to the sum of $2425, that was the amount of a claim arising after the release was signed, and not included within it. There was some evidence tending to sustain the findings of the referee in support of this item, and we agree with the Circuit Court of Appeals that no error was committed in the matter of amending the complaint, and in holding that a recovery could be had for this amount under the complaint as amended.

The judgment of the Circuit Court of Appeals for the Second Circuit is reversed, with costs; the judgment of the Circuit Court for the Southern District of New York is also reversed, and the cause remanded to the latter court, with a direction to enter judgment in favor of plaintiff and against defendant, for

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Syllabus.

$2425, with interest from June 30, 1888, less the sum of $521.78, with interest from the same date; the costs of the Circuit Court of Appeals to be paid by defendant in error therein; and the costs in the Circuit Court to be adjusted as to that court may seem just under the circumstances.

Ordered accordingly.

MOFFETT, HODGKINS AND CLARKE COMPANY v. ROCHESTER.

CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 217. Argued April 10, 11, 1900.—Decided May 21, 1900.

The city of Rochester invited proposals from contractors for two separate contracts for work to be done for the improvement of its water works. Among others who bid were the petitioners, the Moffett, etc. Company, who put in bids for each. Owing to causes which are set forth in full in the opinion of the court, some serious mistakes were made in the figures in their proposals, whereby the compensation that they would receive if their bids were accepted and the work performed by them would be diminished many thousand dollars. When the bids were opened by the city government their bids were the first opened, and as they were read aloud their engineer noticed the errors and called attention to them and stated what the figures were intended to be and should be. The statutes of New York provided that "neither the principal nor sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made and the same shall have been duly executed." The city government rejected one of their bids and accepted the other, and called for its performance at the prices stated in the bid. The company declined to enter into a contract for the performance of the work at that price; and, claiming that the city threatened to enforce the bond given with the proposals, brought suit praying for a reformation of the proposals to conform to the asserted intention in making them and their execution as reformed, or their rescission; and for an injunction against the officers of the city, restraining them from declaring the complainant in default, and from forfeiting or enforcing its bond. Judgment was rendered in the Circuit Court in the company's favor, which was reversed in the Circuit Court of Appeals. The case was then brought here on certiorari. *Held:*

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Statement of the Case.

(1) That there was no doubt of the mistake on the part of the company;
(2) That there was a prompt declaration of it as soon as it was discovered;
(3) That when this was done the transaction had not reached the degree of a contract.

The party alleging a mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt on the mind of the court as to either of these points. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified. *Hearne* v. *Marine Ins. Co.*, 20 Wall. 488, cited on these points and approved.

THIS suit grows out of alleged errors in the proposals of the complainant for the execution of certain improvements conducted by the city of Rochester, New York.

The proposals of the complainant were accepted, but it declined to enter into a contract in accordance therewith, on the grounds hereafter stated, and the city, it is claimed, threatened to enforce the bond given with the proposals.

The bill prays for a reformation of the proposals to conform to the asserted intention in making them and their execution as reformed, or their rescission. Also an injunction against the officers of the city declaring complainant in default, its bond forfeited or enforced.

The substance of the bill is that the city of Rochester, through its proper executive board, determined to make improvements and extensions in the city's water works, and, among other things, to construct a masonry conduit for a distance of 12,000 feet from Hemlock Lake northward, and proposed to enter into a contract therefor. The contract was known as contract No. 1.

Also, to construct a riveted steel pipe conduit thirty-eight inches or forty inches in diameter, commencing at the north end of the masonry conduit, and terminating at Mount Hope reservoir, in the city; length, about 140,000 feet. The contract was known as contract No. 2.

Voluminous specifications were prepared by the city, in printed form, aggregating about three hundred printed pages,

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elaborately specifying, with infinite detail, the requirements of the executive board, the method in which the work was to be performed, the character of the materials required to be furnished, and the tests to which the materials were to be subjected. A copy of the schedule, with other schedules, was attached to the bill.

On December 10, 1892, public notice was given to contractors that proposals would be received for such work until 12 o'clock noon of December 23, 1893, at which time the bids were to be publicly opened by the chairman of the executive board.

The complainant was a contractor having an office in New York, and employed engineers to prepare proposals of the character contemplated by the city of Rochester, and complainant's officers were engaged in important and distracting occupations, and connected with other business which required them to delegate the duties ordinarily performed by them in connection with the work, such as described, to their subordinates. The agents of complainants, though they exercised due diligence, were unable to procure the forms of the proposals for such contracts until on or about the 15th of December, 1892, and its engineer proceeded to Rochester on the 20th of December, 1892, having attempted in the meantime to familiarize himself with the terms of such contracts, and there conferred with the engineers of the city, visited the line of the proposed conduit, and proceeded with the preparation of the proposals of the contracts Nos. 1 and 2.

The labor devolving upon him in the period of time allowed him for preparing the proposals made him nervous and confused, and in transcribing the figures prepared by him he accidentally made certain clerical errors.

Contract No. 2 submitted for consideration two routes, over 8000 feet of the 140,000 of the proposed steel conduit. They were respectively designated in the proposals and specifications route "A" and route "B," and the city reserved the right of electing either of them, and further electing to require a thirty-eight inch pipe or a forty inch pipe to be furnished by contractors.

Route "A" was located in alluvial flats through which the

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creek meanders, and involved several crossings of its existing and former channels. Route "B" was located wholly west of the creek, and required the construction of a tunnel with the necessary shafts, inlet and overflow chambers, manholes and their appurtenances.

The specifications of route "A" involved sixty-one different items and quantities of work and materials, route "B" seventy-five. Among the items of route "B" was that known as "d," and described in the specifications as follows:

"For all earth excavations in open trenches or pits, for the masonry and pipe conduit, entrance and overflow chambers, gate vaults, blow offs, pipe overflows, bridges, railroad crossings, creek crossings and culverts carried under said conduit, including bracing and sheeting, back filling of trenches and masonry, making embankments and other final disposal of the excavated material with haul of 1000 feet or less, bailing and draining and all incidental work."

That item in route "A" was in precisely the same language, and the quantity of excavation contemplated by said items was 184,000 cubic feet of earth, and referred to precisely the same work. The complainant and its engineer intended to bid for said work the sum of 70 cents per cubic yard, and which sum was a fair and reasonable price for the work, and such sum was inserted in the proposal for route "A," but by accident and mistake 50 cents was inserted in the proposal for route "B," and the price intended to be proposed therefor was some $36,800. The sum of 50 cents per cubic yard was a wholly insufficient price for such work. The proposal in route "B" also contained an item in the following language, to wit: "'h.' For all earth excavation in tunnel, including all necessary bracing, timbering, lighting, ventilating, removal and back filling and other final disposal of the excavated material with haul of 1000 feet or less, pumping, bailing and draining and all incidental work."

The defendants' engineer estimated the quantity of excavation under this item at 2000 cubic yards, and it was intended to charge for such work $15 per cubic yard, which was a fair and reasonable charge. In haste and confusion the engineer,

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who is extremely near sighted, in transcribing his figures, by accident and mistake inserted the sum of $1.50 per cubic yard, which was grossly inadequate and far below what would be the actual cost of the work under the most favorable circumstances. The difference between the bid as inserted and that which was intended to be inserted was the sum of $27,000.

A bond was required with proposals in the penal sum of $90,000, conditioned upon the performance of the work if the bid should be accepted and the making of the contract with the city in accordance with the notice to contractors. Complainant executed the bond with Henry D. Lyman and the American Surety Company as sureties, but at the time of its execution the proposal annexed thereto was entirely in blank, and in the time which elapsed between the time the bond was taken to the city and the presentation of the proposals it was impossible to insert in the pamphlet containing the bond the proposals for the work contemplated by contracts Nos. 1 and 2, or either of them.

The prices were inserted in other and different pamphlets of the same general character, but were not signed or in any way executed by complainant or by any of its officers. The pamphlets containing the bond and the pamphlet containing the proposals were placed in a single package.

The complainant was led to believe by the defendants and their officers that although the masonry conduit and the riveted steel conduit were separately described, they constituted a continuous piece of work, and any person bidding upon both sections whose bid was lower in the aggregate than any other for the same work should be awarded the contract. With this understanding and for the purpose of making a single proposition for the entire work, complainant deposited the package containing the proposals for the work upon both sections with the executive board. The notice to contractors provided that every bid for the masonry conduit should be indorsed "Proposal for performing contract No. 1, Rochester Water Works Conduit," and that every bid for the riveted steel pipe conduit should be inclosed in a sealed envelope and indorsed "Proposal for performing of contract No. 2, Rochester Water Works Conduit."

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Complainant did not comply with the provisions, but addressed its proposals in one package to the executive board. The proposals were immediately opened by the chairman of the board and declared informal, and not in compliance with the requirements of the board, but they were nevertheless read together with other proposals. That for line "B," in contract No. 2, was read by the clerk in the presence of the members of the board before any other proposals for work on said line were read, and immediately upon reading item "d," relating to earth excavation in open trenches, the engineer of complainant, who prepared the proposals, informed the board that the price of fifty cents per cubic yard was a clerical error, and that it was the intention to charge seventy-five cents per cubic yard, the same price charged for the identical work on line "A."

There were six bidders on contract No. 1, including complainant. Its bid was $473,790. The lowest bidder was W. H. Jones & Son, whose bid was $262,518.

The bids on contract No. 2, with items, were tabulated in a statement and annexed to the bill.

The complainant's bid on earth excavation, in open trench on route "A," was 70 cents per cubic yard. The other bids ranged from 75 cents to 85 cents.

For the same work on route "B" complainant's bid was 50 cents per cubic yard. The other bids from 75 cents to 85 cents.

The complainant's bid for earth excavations in tunnel upon route "B," contract No. 2, was $1.50 per cubic yard. The other bids were, respectively, $12.00 and $15.00.

The complainant's aggregate bid for work on route "B" was $857,552.50. The lowest was $1,130,195.00, that of Whitmore, Rauber & Co.

If complainant was allowed the amount of its error, viz., $63,800, its proposal for route "B" would be $921,354.50, which sum was $208,842.50 less than the next lowest bid, which was that of Whitmore, Rauber & Vicinus.

The aggregate bids of complainant as corrected were $1,395,142.50, which were considerably less than the aggregate of any other contractor. For thirty-eight inch pipe on line "B"

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its aggregate bid was $1,331,342.50, which was largely below that of any other contractor.

In order to take an improper and unconscionable advantage of complainant and the clerical errors made by it, the executive board on the 10th of January, 1893, notified complainant that the defendants intended to enter into a contract for the work of contract No. 1 with W. H. Jones & Son, although complainant's proposals for the work on both contracts were the lowest in the aggregate for the entire work contemplated. Thereupon on the 11th of January, 1893, before any official action with respect to letting the contracts was taken, complainant protested against the division of the proposals and letting the work of contract No. 1 and No. 2 separately, and insisted that the defendants were bound to enter into a contract with it for the entire work described in both contracts, or none at all, and informed the defendants of the clerical errors for the work on line "B," and requested to correct them. And further demanded the contract for both sections at the corrected prices, or that it be permitted to withdraw its proposals.

On the 12th of January, 1893, the executive board, acting in bad faith and to take an unfair and unconscionable advantage of the clerical errors which had been committed, the commission of which the defendants conceded, adopted the resolution annexed to the bill and marked schedule "B," and caused copies to be served on the complainant.

The defendant proposed, in conformity with the resolutions, to insist upon the execution of the contract for laying a thirty-eight inch pipe on route "B" for the prices inserted in complainant's proposal, and intended, if complainant refused, to declare it in default, the bond executed by it forfeited, and to proceed to enforce the bond.

The said threatened action was contrary to good conscience, the contents of the proposals and the rights of complainant, and unless restrained, would cause it irreparable injury, for which there was no adequate remedy at law. The matter in dispute, exclusive of interest and cost, exceeded the sum or value of $2,000.

The following are the resolutions marked schedule "B":

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Statement of the Case.

"OFFICE OF THE EXECUTIVE BOARD,
"ROCHESTER, N. Y., *January* 12, 1893.

"By Mr. Schroth:

"Resolved, That the proposal of the Moffett, Hodgkins & Clarke Company, of New York, N. Y., submitted on December 23, 1892, for the construction of a riveted steel pipe conduit 38 inches in diameter, and all the required appurtenances thereto, commencing at the north end of the contemplated masonry conduit near the village of Hemlock Lake, Livingston County, N. Y., and terminating at Mt. Hope reservoir, in the city of Rochester, N. Y., and by route 'B' as described in the notice of letting for said work, be, and the same is hereby, accepted, and that said work be and hereby is awarded to said Moffett, Hodgkins & Clarke Company.

"By Mr. Schroth:

"Resolved, That the Moffett, Hodgkins & Clarke Company, of New York, be and they are herewith required to attend at the office of this board, along with the sureties to be offered by said company, on or before Thursday, January 19, 1893, and to execute at that time the contract for the performance of the work of constructing a riveted steel pipe conduit 38 inches in diameter, and all the required appurtenances thereto, by route 'B,' from the north end of the contemplated masonry conduit near the village of Hemlock Lake, Livingston County, N. Y., to Mt. Hope reservoir in the city of Rochester, N. Y., and that the failure of such attendance and execution will be regarded as an abandonment of intention on the part of said Moffett, Hodgkins & Clarke Company to perform said work.

"By Mr. Schroth:

"Resolved, That the clerk be, and he is hereby, directed to cause immediate legal service of notice of award of contract to be made on the Moffett, Hodgkins & Clarke Company, of New York, N. Y., in accordance with the foregoing resolutions."

The answer admitted the allegations of the bill in regard to the powers of the executive board, and that it determined to enter into a contract set forth in the bill; that it prepared spec-

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ifications and gave notice as stated, and required bond to accompany proposals conditioned as alleged; that the complainant had such bond executed and annexed the same to its proposal of contract No. 2.

The answer alleged that the defendants did not know and could not set forth their belief or otherwise whether complainant was a corporation or employed engineers, or what their duties were, or that the officers of the complainant had to delegate important duties to subordinates, or whether its agents could procure firms to contract and make proposals before the 15th of December, 1892; or whether its engineer was nervous or made mistakes as alleged or in the way alleged, or the prices bid were inadequate, or that complainant was led to believe by the defendants that contracts Nos. 1 and 2 would be let jointly and not separately, or its bid declared informal and cannot be received, or that its engineer when the bids were opened notified the board that the prices which had been read for item "d" of route "B" in contract No. 2 of fifty cents per cubic yard was a clerical error.

The answer then proceeded in substance as follows:

The notice for bids required that all bids should state the prices for every separate item of work named in the proposals, should be plainly stated and distinctly written in ink, both in words and figures, in the proposed blanks left therefor; that the complainant's engineer received all communications requested by him from the executive board and its engineer, and all the plans and specifications and information were at the complainant's command before its submission of the proposals for the contract.

On account of the treacherous subsoil disclosed by borings along route "B" in contract No. 2, the latter route would be the least expensive, and the prices complained of by complainant were reasonable and fair values for the work set forth, and it was denied that clerical errors were contained in the proposals, or that they were less than the average bids by competitive bidders, and averred that the amounts were knowingly and intentionally inserted to make complainant's bid what is known as an "unbalanced bid," to wit, in which the contractor will

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give a "low price for one kind of work or materials in the same contract with the hope that the quantity of work and materials for which a low price is bid will be reduced, while the quality of materials or work for which a high price is bid will be increased, thus making up on the high price bid sufficient to give the contractor a large profit upon the whole work."

The complainant bid upon some items in contract No. 2 in excess of a reasonable price, thus making its bid for route "B," contract No. 2, an unbalanced bid, enabling complainant to realize upon the completion of the work far in excess of the amount based upon the estimates of defendant's engineer.

In pursuance of the notice to contractors the board awarded to W. H. Jones & Sons contract No. 1, they being the lowest bidders, and to complainant contract No. 2, it being the lowest bidder, but this was not done to take undue and unconscionable advantage of the manner in which the proposals were made under contracts Nos. 1 and 2, and presented to the board, nor did the board act in bad faith and award the contract for the purpose of taking advantage of the alleged clerical errors.

On the 12th of December, 1892, by the resolution marked schedule "B," the board duly and legally awarded to the complainant the contract for the construction of the conduit of route "B" in contract No. 2, and the complainant was notified to attend at the office of the board with its sureties to execute the proposed contract, and the complainant "without sufficient reason or excuse, and with intent to defraud said defendants, did refuse and neglect to enter into said contract, and said defendants deny that said complainant is entitled to the relief, or any part thereof, in the said complaint demanded, and they respectfully submit that the injunction awarded against them by this honorable court on the 15th day of February, 1893, ought to be dissolved, and that the said bill ought to be dismissed, with costs."

Evidence was submitted on the issues, including the specifications, proposals and bond.

A decree was entered adjudging the proposals of the complainant for the conduit on line or route "B" to be "rescinded, canceled and declared null, void and of no effect," and ordering

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an injunction to be issued restraining the city and its officers from declaring complainant in default with respect to its bids and proposals, "or from declaring forfeited the bond executed by and on behalf of said complainant, and accompanying the aforesaid bids and proposals, or from in any manner suing upon or attempting to enforce or collect the said bond."

Commenting on the facts the learned trial jndge said:

"The question in this controversy is plain and simple: Shall the complainant be held to an erroneous bid by which it agreed to do certain work for the city of Rochester for $63,800 less than was intended? The work related to the construction of a conduit to convey the water of Hemlock Lake to the city. By a mistake of Mr. Burlingame, its engineer, the complainant bid fifty cents per cubic yard for earth excavation in open trenches when it intended to bid seventy cents, and one dollar and fifty cents for earth excavation in tunnel when it intended to bid fifteen dollars.

"The proof of these mistakes is clear, explicit and undisputed. As soon as the item proposing to do the work for fifty cents, as aforesaid, was read at the meeting of the executive board, and before any action was taken thereon, Mr. Burlingame stated that it was an error, and that complainant intended to bid for route B the same as for route A, viz., seventy cents.

"There is some testimony of a negative character that this prompt repudiation of the bid did not take place, but the great weight of testimony is in favor of the complainant. Had the errors been corrected the complainant's bid would still have been $200,000 below the next lowest bid. On route A the complainant's bid was $903,324. The mistakes all occurred on route B, and yet route A was selected, and the work awarded to other bidders for $1,123,920, or $220,596 more than the complainant's proposal.

"Upon the principal issue there is no disputed question of fact. Counsel for the defendants, though not admitting the mistakes, which are the basis of the action, do not dispute them. The oral argument proceeded upon the theory that the mistakes were made precisely as alleged.

"In order that no injustice may be done to the defendants,

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their position in this regard is stated in the language of their brief, as follows:

"'We admit that the evidence of the complainant shows that Mr. Burlingame entered in his proposal sheets certain figures and numbers different from those which he intended to make, and that the defendants have no evidence to contradict his testimony.'" 82 Fed. Rep. 255.

On appeal to the Circuit Court of Appeals the decree was reversed, with instructions to the Circuit Court to dismiss the bill. 33 C. C. A. 319. The case is here on writ of certiorari.

Other facts are stated in the opinion.

Mr. Louis Marshall for petitioner.

Mr. Porter M. French for respondents.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

Both of the lower courts agree that there was a mistake. The Circuit Court said that the proof of it was "clear, explicit and undisputed." The Circuit Court of Appeals, while expressing no dissent as to the fact, said "that one of the alleged mistakes, that in respect to the tunnel excavation, was not a mistake in any legal sense, but was a negligent omission arising from an inadequate calculation of the cost of the work."

We do not think the negligence was sufficient to preclude a claim for relief if the mistakes justified it.

This court said in *Hearne* v. *Marine Insurance Company*, 20 Wall. 488, 490, by Mr. Justice Swayne:

"The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.

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"The party alleging the mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be mutual, and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified."

The last two propositions may be claimed to be pertinent to the case at bar, even though the transactions between the parties be considered as a completed contract.

There was no doubt of the mistake, and there was a prompt declaration of it as soon as it was discovered and before the city had done anything to alter its condition. Indeed, according to the testimony of one witness, the clerk of the board before the mistake was declared by complainant's engineer expressed the thought that fifty cents per cubic yard for earth excavation was too low, "and there was some discussion about it at the time, but Mr. Aldridge (he was chairman of the board) said he (the clerk) might as well go on and read it, as the bid was informal." The reading proceeded, and subsequently the board let the work on contract No. 1 to Jones & Son, and accepted complainant's proposals containing the mistakes for the work on line "B," contract No. 2, although complainant protested that there was a mistake in the price of earth excavation and also in tunnel excavation. This was inequitable, even though it was impelled by what was supposed to be the commands of the charter. It offered or forced complainant the alternative of taking the contract at an unremunerative price, or the payment of $90,000 as liquidated damages. We do not think such course was the command of the statute or the board's duty.

The rule between individuals is that until a proposal be accepted it may be withdrawn, and if this principle cannot be applied in the pending case, on account of the charter of the city, there is

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certainly nothing in the charter which forbids or excuses the existence of the necessary elements of a contract.

The charter of the city provides that "neither the principal nor sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made, and the same shall be duly executed." A perfectly proper provision, but as was said by the learned Circuit Court:

"The complainant is not endeavoring 'to withdraw or cancel a bid or bond. The bill proceeds upon the theory that the bid upon which the defendants acted was not the complainant's bid; that the complainant was no more responsible for it than if it had been the result of agraphia or the mistake of a copyist or printer. In other words, that the proposal read at the meeting of the board was one which the complainant never intended to make, and that the minds of the parties never met upon a contract based thereon. If the defendants are correct in their contention there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If, through an error of his clerk, he has agreed to do work worth a million dollars for ten dollars, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven to bankruptcy. The defendant's position admits of no compromise, no exception, no middle ground."

These remarks are so apposite and just it is difficult to add to them. The transactions had not reached the degree of a contract — a proposal and acceptance. Nor was the bid withdrawn or cancelled against the provision of the charter. A clerical error was discoverd in it and declared, and no question of the error was then made or of the good faith of complainant.

It is true it is now urged by counsel that there was no mistake, but that the prices were deliberately and consciously inserted for the purpose of making an "unbalanced bid," in which low prices in some items are compensated by high prices in others. The Circuit Court and the Circuit Court of Appeals

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found against this view, and this court usually accepts such concurrence as conclusive.

The Circuit Court of Appeals, however, found that while there was a clerical error for the earth excavation in contract No. 2, route "B," that the alleged mistake in tunnel excavation "was not a mistake in any legal sense, but was a negligent omission arising from an inadequate calculation of the cost of the work." Further, the court said:

"It is also manifest that the complainant did not intend to give the board an opportunity to correct the mistakes and award the contract on the corrected basis. There was no color of foundation for the assertion that the proposals were to be treated as a single bid for contracts No. 1 and No. 2, and that both contracts must be awarded to the complainant or neither. The position thus taken by the complainant was well calculated to excite distrust on the part of the board and induce its members to believe that the alleged mistakes were an afterthought, conceived when the complainant had become convinced by studying the proposals of its competitors that it could not profitably carry out the contract on the terms proposed."

We are unable to concur in either of these conclusions. The mistake in tunnel excavations arose from inadvertently making the cost of one item — mere earth digging and putting the dirt into cars — the total cost without making "any allowance for any work preparatory to it or connected with it," to quote the testimony of complainant's engineer. And it seems impossible for the error to have escaped the notice of the board. Other contractors charged for the same work $12 and $15.

The conclusion that the complainant did not intend to give the board an opportunity to correct the mistakes is based on a letter addressed to the board, in which it claimed unity in the contracts and bids, and demanding that "the contract in its entirety for both sections of the work be awarded to us at the corrected price, or that we may be allowed to withdraw our proposal and have our bid returned to us."

But before the time expressed in the resolutions of the executive board of the city for the complainant to appear and execute a contract, or it would be regarded as abandoning its intention

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to do so, complainant filed its bill in this case, and appealed to a court of equity to determine its rights and obligations.

On filing the bill and supporting affidavits, on the 18th of January, 1893, an order was issued temporarily restraining the officers of the city from declaring the complainant in default or from forfeiting or suing on its bond, until a motion for an injunction *pendente lite* could be heard. Subsequently, after hearing and argument, an injunction *pendente lite* was issued.

Prior to its issuing, but after the restraining order, the executive board accepted the bid of Whitmore, Rauber & Vicinus, and entered into a contract with them for the construction for the riveted steel pipe conduit, thirty-eight inches in diameter, for route "A," for eight thousand feet. That is on a different route and claimed to be the subject of a different contract from that awarded to the complainant.

This action made a reformation of the proposals impossible—made any action of the Circuit Court impossible, except to annul the proposals or dismiss the bill and subject the complainant to a suit on its bond. If the decree was narrowed to this relief it was the fault of the city, not of the complainant. Whatever its prior claims and pretensions may have been, by submitting itself to a court of equity complainant submitted itself to abide by what that court should decree, and the alternative of a reformation of the proposals was certainly not their execution unreformed.

By letting the contract to Whitmore, Rauber & Vicinus, the city, in effect, evaded the restraining order, forestalled the action of the Circuit Court, and prevented the reformation of the proposals; and by preventing that justified the decree which was entered.

The decree of the Circuit Court of Appeals is reversed and that of the Circuit Court is

Affirmed.

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NEW YORK LIFE INSURANCE COMPANY *v.* CRAVENS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 262. Argued April 25, 1900.—Decided May 28, 1900.

The contract for life insurance in this case, made by a New York insurance company in the State of Missouri, with a citizen of that State, is subject to the laws of that State regulating life insurance policies, although the policy declares "that the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted as a whole and in each of its parts and obligations, according to the laws of the State of New York, the place of the contract being expressly agreed to be the principal office of the said company in the city of New York."

The power of a State over foreign corporations is not less than the power of a State over domestic corporations.

The business of insurance is not commerce, and the making of a contract of insurance is a mere incident of commercial intercourse in which there is no difference whatever between insurance against fire, insurance against the perils of the sea, or insurance of life.

THE controversy in this case is as to the amount due upon a policy of insurance issued by the plaintiff in error, upon the life of John K. Cravens, husband of the defendant in error.

The contention of the plaintiff in error is that there is only due on the policy, if anything, the sum of $2670; that of defendant in error is that she is entitled to the full amount of the policy, to wit, $10,000, less unpaid premiums.

These contentions depend chiefly for solution on the statute of Missouri, inserted in the margin,[1] Missouri Rev. Stat. 1879,

[1] SEC. 5983. Policies non-forfeitable, when.—No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this State, on and after the first day of August, A.D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the non-payment of premiums thereon, but it shall be subject to the following rules of commutation, to wit: The net value of the policy when the premium becomes due and is not paid shall be computed upon the American experience table of mortality, with four and one half per cent interest per annum, and after deducting from three fourths of

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c. 119, Art. 2, and the issue arising is, whether the defendant in error, as beneficiary in the policy because of the payment of

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such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be cancelled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but if the policy shall be an endowment, payable at a certain time, or at death if it should occur previously, then if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium, for a pure endowment of so much as such premium will purchase, determined by the age of the insured at date of defaulting the payment of premium on the original policy, and the table of mortality and interest as aforesaid, which amount shall be paid at the end of the original term of endowment, if the insured shall then be alive.

SEC. 5984. A paid-up policy may be demanded, when.—At any time after the payment of two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of the policy may demand of the company, and the company shall issue its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the American experience table of mortality, with interest at the rate of four and a half per cent per annum, without deduction of indebtedness on account of said policy, will purchase, applied as a single premium upon the table rates of the company, and in case of a limited payment life policy, or of a continued payment endowment policy payable at a certain time, or of a limited payment endowment policy, payable at a certain time, or at death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such premiums stipulated to be paid: Provided, that from such amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy: and provided further, that the policy holder shall, at the time of making demand for such paid-up policy, surrender the original policy, legally discharged, at the parent office of the company.

SEC. 5985. Rule of payment on commuted policy.—If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section 5983, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy,

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four annual premiums, and notwithstanding the omission to pay the fifth and sixth annual premiums, is entitled to extended insurance as provided in section 5983, that is, to the full amount of the policy less unpaid premiums, or is entitled to the amount of commuted insurance tendered by plaintiff in error.

The case was submitted upon an agreed statement of facts substantially as follows:

That the defendant is a corporation organized and existing under the laws of the State of New York as a mutual life insurance company, without capital stock, having its chief office in the city of New York, and was, at the date of issuing the policy in question and since has been engaged in the business of insuring lives through branch offices in the different States and Territories of this country and certain foreign countries; and that it maintains agents and examiners in the State of Missouri.

On May 2, 1887, the local agent of the company solicited John K. Cravens, at his residence in Missouri, to insure his life in the

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the same as if there had been no default in payment of premiums, anything in the policy to the contrary notwithstanding: Provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy, within ninety days after the decease of the insured; and, provided, also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premiums in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid.

SEC. 5986. The foregoing provisions not applicable, when.—The three preceding sections shall not be applicable in the following cases, to wit: If the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance for which the net value shall be equal to that provided for in section 5984, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this act shall not be applicable.

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company, and thereupon Cravens signed and delivered to the local agent a written application for the policy in suit. The application was made a part of the policy, and contained the following provisions:

"That inasmuch as only the officers of the home office of the said company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises or information be reduced to writing and presented to the officers of said company, at the home office, in this application. . . .

"That the contract contained in such policy and in this application shall be construed according to the laws of the State of New York, the place of said contract being agreed to be the home office of said company in the city of New York."

The application was signed by the agent of the company and forwarded to the latter's home office in New York, and thereupon the policy in suit was issued and transmitted to Kansas City by the company to its agent, who there received the same, and there delivered it to Cravens on the 20th of May, 1887, and collected the first premium provided to be paid.

Four annual premiums of $589.50 each were paid in Missouri. The fifth and sixth premiums were not paid. Cravens died November 2, 1892, in Missouri, and proof thereof was duly made.

The company had different forms of policies, and Cravens selected a non-forfeiting limited tontine policy, fifteen years' endowment, with the limited premium return plan of insurance. This plan is described in the policy as follows:

"This policy is issued on the non-forfeiting limited tontine policy plan, the particulars of which are as follows:

"That the tontine dividend period for this policy shall be completed on the 11th day of May, in the year nineteen hundred and two.

"That no dividend shall be allowed or paid upon this policy

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unless the person whose life is hereby insured shall survive until completion of its tontine dividend period, and unless this policy shall then be in force.

"That surplus or profits derived from such policies on the non-forfeiting limited tontine policy plan as shall not be in force at the date of the completion of their respective tontine dividend periods, shall be apportioned among such policies as shall complete their tontine dividend periods."

At the end of the tontine period certain benefits were to be allowed, which are stated in the policy, but which need not be repeated.

The policy also contained the following provision:

"That if the premiums are not paid, as hereinafter provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the company, except that if this policy, after being in force three full years, shall lapse or become forfeited for the non-payment of any premium, a paid-up policy will be issued on demand within six months after such lapse, with the surrender of this policy, under the same conditions as this policy, except as to payments of premiums, but without participation in profits, for an amount equal to as many fifteenth parts of the sum above insured as there shall have been complete annual premiums paid hereon when said default in the payment of premium shall be made; and all right, claim or interest arising, under statute or otherwise, to or in any other paid-up policy or surrender value, and to or in any temporary insurance, whether required or provided for by the statute of any State, or not, is hereby expressly waived and relinquished."

The total number of policies, of the plan of the policy in suit, issued in the year 1887 to the residents of all states and countries where the company was doing business was 5172, covering an aggregate of insurance of $20,154,981.

The amount of paid-up insurance to which the policy was entitled, at the date of lapsing, was $2670. No demand was made for it within six months after default, or at any time. Upon the death of Cravens the company offered to waive the failure to make such demand, and tendered defendant in error,

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Counsel for Parties.

and still tenders her, the amount of such paid-up policy, which she declined, and still declines.

On the 11th of May, 1891, Cravens was fifty-three years old, "and the term of temporary insurance procured at that date by three fourths of the net value of the policy, taken as a single premium for the amount written in the policy, was six years and forty-six days from the 11th day of May, 1891, making said policy, if subject to said extended insurance, in force at the death of the said Cravens."

The defendant in error claims under the policy $10,000, less the amount of unpaid premiums, with interest thereon, which left a balance of $8749.21, with interest at six per cent from November 30, 1892. The plaintiff in error admitted and offered to pay the sum of $2670, which plaintiff in error declined to receive.

The trial court rendered a judgment for the plaintiff (defendant in error) for the sum of $2670.

On appeal to the Supreme Court of the State the judgment was reversed, and the case was remanded with directions to enter judgment for plaintiff (defendant in error) for the sum of $8749.21, with interest at six per cent from November 30, 1892.

The case was then brought here.

It is urged as error against the judgment of the Supreme Court of the State that it makes the law of Missouri and not the law of New York the law of the contract, as provided in the application for the policy, thereby denying to the plaintiff in error a contractual liberty without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States; and that the statute of Missouri is an attempted regulation of interstate commerce.

Mr. Frederick N. Judson for plaintiff in error. *Mr. George W. Hubbell* was on his brief.

Mr. William B. C. Brown for defendant in error. *Mr. J. V. C. Carnes* and *Mr. James H. Cravens* were on his brief.

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Opinion of the Court.

MR. JUSTICE MCKENNA after stating the case, delivered the opinion of the court.

The plaintiff in error presents its contentions in many forms, but they are all reducible to one, to wit, that the statute of Missouri has been decided to supersede the terms of the policy, and to be the rule and measure of the rights and obligations of the parties, notwithstanding the application for the policy declares "that the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted as a whole and in each of its parts and obligations, according to the laws of the State of New York, the place of the contract being expressly agreed to be the principal office of the said company, in the city of New York."

What, then, is the meaning of the Missouri statute, or, rather, what meaning did the Supreme Court declare it to have?

It declared that the statute did not have the meaning the trial court decided it to have. In other words, it declared that the policy did not come within the exception of the statute providing for paid-up insurance, in lieu of temporary insurance, which was one of the contentions of the plaintiff in error, and on account of which it had tendered the sum of $2670, and sustaining which the trial court rendered its judgment.

With this part of the opinion, however, we have no concern. Our review is only invoked of that part of the opinion which decides that the Missouri statute is the law of the policy, and which annuls the provisions of the policy which contravene the statute. And even of this part our inquiry is limited. If we are bound by the interpretation of the statute we need not review the reasoning by which that interpretation was reached. And we think we are bound by it.

The court said, though more by inference than by direct expression, that the statute was a condition upon the right of insurance companies to do business in the State.

This conclusion it fortified by the citation of cases, and said (148 Mo. 583):

"Foreign insurance companies which do business in this State do so, not by right, but by grace, and must in so doing con-

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form to its laws; they cannot avail themselves of its benefits without bearing its burdens. Moreover, the State may prescribe conditions upon which it will permit foreign insurance companies to transact business within its borders or exclude them altogether, and in so doing violates no contractual rights of the company. *State* v. *Stone*, 118 Mo. 388; *Daggs* v. *Ins. Co.*, 136 Mo. 382; *S. C.* 172 U. S. 557."

And further:

"As the non-forfeiture clause in section 5983 does not come within the exceptions specified in section 5986, it would seem that the provision in the policy with respect to its forfeiture or lapse after being in force three full years, by the non-payment of premiums, is void and of no effect, and that such statutory provision cannot be waived.

* * * * * * * *

"It is well settled that the legislature of the State has the power to pass laws regulating and prescribing rules by which foreign insurance companies may do business in this State, and to prohibit them from doing so altogether if inclined. *Paul* v. *Virginia*, 8 Wall. 168; *State* v. *Stone*, *supra*; *Hooper* v. *California*, 155 U. S. 648; *Daggs* v. *Insurance Co.*, *supra*. This case has recently been affirmed by the Supreme Court of the United States.

"It logically follows that in passing the sections of the statute quoted the legislature did not exceed the powers conferred upon it by the state constitution, and that such legislation is not in conflict with any provision of the Constitution of the United States."

From the Missouri law as thus established, may the plaintiff in error claim exemption by virtue of the Constitution of the United States?

What the powers of a corporation are in relation to the State of its creation—what the powers of a corporation are in relation to a state where it is permitted to do business, was declared early in the existence of this court, and has been repeated many times since. What those powers are we took occasion to repeat in *Waters-Pierce Oil Co.* v. *The State of Texas*, decided at the present term. 177 U. S. 28.

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The case arose from a liberty of contract asserted by the Waters-Pierce Oil Company against certain statutes of the State of Texas prohibiting contracts in restraint of competition in trade. The statute was not only assailed because it took away the liberty of contract, but because it discriminated between persons and classes of persons. The latter ground we declined to consider, because it did not arise on the record. Of the former we said:

"The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the State over them. What those rights are and what that power is has often been declared by this court.

"A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations."

And as the state court had held that the statute was a condition imposed upon the oil company doing business within the State, we said of the statute that, "whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it."

We stated the exceptions of the rule to be "only cases where a corporation created by one State rests its right to enter another and engage in business therein upon the Federal nature of its business."

Is the plaintiff in error within the exception? If not, the pending controversy must be determined against it.

It is difficult to give counsels' contentions briefly and at the same time clearly, nor are we sure that we can distinguish by precise statement the arguments directed to the invalidity of

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the statute of Missouri as an unconstitutional interference with the contractual liberty of the plaintiff in error, from the arguments which assail the statute as an attempted regulation of commerce between the States. This, however, not on account of any want of clearness in counsel's argument, but on account of the many ways which they have presented and illustrated the argument, and which cannot be noticed in detail without making this opinion too long. We realize the propositions are not the same and should not be confused, though made somewhat dependent upon a common reasoning.

1. A policy of mutual life insurance, it is contended, is an interstate contract, and the parties may choose its "applicatory law." Instances under the law of usury, instances under private international law, are cited as examples and authority. But if such cases apply at all, they necessarily have limitation in the policy of the State. This is not denied, but it is contended that contracting for New York law to the exclusion of Missouri law was "in nowise prejudicial to the interests of the State of Missouri or violative of its public policy."

But the interests of the State must be deemed to be expressed in its laws. The public policy of the State must be deemed to be authoritatively declared by its courts. Their evidence we cannot oppose by speculations or views of our own. Nor can such interests and policy be changed by the contract of parties. Against them no intention will be inferred or be permitted to be enforced.

In passing on the statute in controversy we said, by Mr. Justice Gray, in *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226:

"The manifest object of this statute, as of many statutes regulating the forms of policies of insurance on lives or against fires, is to prevent insurance companies from inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company with the consent of the assured; but it is mandatory and controls the nature and terms of the contract into which the company may induce the assured to enter. This clearly appears from the unequivocal words of command

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and of prohibition above quoted, by which, in sec. 5983, 'no policy of insurance' issued by any life insurance company authorized to do business in this state 'shall, after the payment of two full annual premiums, be forfeited or become void by reason of the non-payment of premium thereon; but it shall be subject to the following rules of commutation;' and in sec. 5985, that if the assured dies within the term of temporary insurance, as determined in the former section, 'the company shall be bound to pay the amount of the policy,' 'anything in the policy to the contrary notwithstanding.'"

And after stating the cases in which the terms of the policy are permitted to differ from the plan of the statute, it was further said:

"It follows that the insertion, in the policy, of a provision for a different rule of commutation from that prescribed by the statute, in case of default of payment of premium after three premiums have been paid; as well as the insertion, in the application, of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not;' is an ineffectual attempt to evade and nullify the clear words of the statute."

In *Orient Insurance Company* v. *Daggs*, 172 U. S. 557, the insurance company contended it had the constitutional right to limit by contract its liability to actual damages caused by fire against the provision of the statute which made, in case of total loss, the amount for which the property was insured the measure of damages. We sustained the statute independently of the ground that it was a condition of the permission of the company to do business in the State. We sustained it on the ground of the clear right of the State to pass it, and to accomplish its purpose by limiting the right of the insurer and insured to contract in opposition to its provisions.

Further comment on this head may not be necessary, and we only continue the discussion in deference to the insistence of counsel upon the interstate character of the policy in suit. It is the basis of every division of their argument, and an immunity from control is based upon it for plaintiff in error, which, it

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seems to be conceded, the State can exert over corporations of its own creation.

An interstate character is claimed for the policy, as we understand the argument, because plaintiff in error is a New York corporation and the insured was a citizen of Missouri, and because, further, the plaintiff in error did business in other States and countries. Does not the argument prove too much? Does it depend upon the residence of plaintiff in error in New York? If so, it would seem that every contract between citizens of different States becomes at once an interstate contract, and may be removed from the control of the laws of the State at the choice of parties. If the argument does not depend on the residence of the plaintiff in error, but on the other elements, a Missouri insurance corporation can have the same relation to them as plaintiff in error, and can be, as much as plaintiff in error claims to be, "the administrator of a fund collected from the policy holders in different States and countries for their benefit"—the condition which plaintiff in error claims demonstrates the necessity of a uniform law to be stipulated by the parties exempt from the interference or the prohibition of the State where the insurance company is doing business. And yet plaintiff in error seems to concede that such power of stipulation Missouri corporations do not have, while it, a foreign corporation and because it is a foreign corporation, does have.

After stating the necessity of a uniform law and an equal necessity that parties may stipulate for it, counsel for plaintiff in error say:

"It necessarily follows, therefore, that the insurance policy contracts of foreign insurance companies, as contracts of other foreign corporations, made by them with the citizens of a State, when doing business in that State through the comity of the State, are like the contracts of natural persons, subject to the limitations of their own charters, and the situs of such contracts is to be determined by the fundamental rules of 'universal law.'

"As will be hereafter seen, this status as foreign corporations does not mean that they were not subject to the laws of the State enacted in the full plenitude of the police power of the State. The State doubtless could limit their contractual power by prohibiting the making of certain contracts. But unless the

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foreign corporation is reincorporated as a domestic corporation, it remains a foreign corporation, and its contracts with citizens of the State are interstate contracts, subject to the right of choice of law thereof, which is inherent in the law of interstate contracts."

A foreign corporation undoubtedly is not a domestic corporation, and the distinction must often be observed, but the deduction from it by plaintiff in error cannot be maintained.

The power of a State over foreign corporations is not less than the power of a State over domestic corporations. No case declares otherwise. We said in *Orient Ins. Co.* v. *Daggs*, *supra*:

"That which a State may do with corporations of its own creation it may do with foreign corporations admitted into the State. This seems to be denied, if not generally, at least as to plaintiff in error. The denial is extreme and cannot be maintained. The power of a State to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in *Hooper* v. *California*, 155 U. S. 648, and need not be repeated."

2. Is the statute an attempted regulation of commerce between the States? In other words, is mutual life insurance commerce between the States?

That the business of fire insurance is not interstate commerce is decided in *Paul* v. *Virginia*, 8 Wall. 168; *Liverpool Ins. Co.* v. *Mass.*, 10 Wall. 566; *Phila. Fire Asso.* v. *New York*, 119 U. S. 110. That the business of marine insurance is not is decided in *Hooper* v. *California*, 155 U. S. 648. In the latter case it is said that the contention that it is "involves an erroneous conception of what constitutes interstate commerce."

We omit the reasoning by which that is demonstrated, and will only repeat, "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea.'" And we add, or against the uncertainty of man's mortality.

Judgment affirmed.

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BANHOLZER *v.* NEW YORK LIFE INSURANCE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 277. Argued and submitted April 27, 1900.—Decided May 28, 1900.

This case is dismissed for want of jurisdiction, as the Supreme Court of Minnesota did not deny the validity of the New York statute with regard to insurance, but only construed it, and even granting that its construction was erroneous, faith and credit were not denied to the statute.

THIS action was brought in the District Court of the Second Judicial District of the State of Minnesota upon a life insurance policy for $20,000, issued by defendant in error to William Banholzer, husband of the plaintiff in error, dated the 16th of September, 1895, payable upon the death of Banholzer to plaintiff in error, or to Banholzer himself on the 16th of September, 1915, if he should be living then.

The premiums were to be paid annually in advance on the 16th day of September of every year, until twenty full years' premiums should be paid.

The first premium was paid, which continued the policy in force until the 16th of September, 1896.

The policy contained the following provisions:

"If any premium is not paid on or before the day when due, this policy shall become void, and all payments previously made shall remain the property of the company, except as hereinafter provided.

"A grace of one month will be allowed in payment of subsequent premiums after this policy shall have been in force three months, subject to an interest charge at the rate of five per cent per annum for the number of days during which the premium remains due and unpaid. During the month of grace this policy remains in force, the unpaid premium, with interest, as above, remains an indebedtedness to the company, which will be deducted from the amount payable under this policy if the death of the insured shall occur during the month."

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Statement of the Case.

On the 6th day of October, 1896, Banholzer paid the defendant the sum of $286 in cash, and executed and delivered to the defendant the following note:

"St. Paul, Minn., 9–16, 1896.

"Without grace, six months after date, I promise to pay to the order of the New York Life Insurance Company, eight hundred and sixty dollars, at Second National Bank, St. Paul, Minn. Value received, with interest at the rate of five per cent per annum.

"This note is given in part payment of the premium due 9–16–'96, on the above policy, with the understanding that all claims to further insurance and all benefits whatever which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to the New York Life Insurance Company, if this note is not paid at maturity, except as otherwise provided in the policy itself.

(Signed) "William Banholzer."

The following receipt was given for the note:

"St. Paul, Minn., 10–6–'96.

"Note six months, after date 9–16–'96, due 3–16–'97, without grace, made by William Banholzer, payable at Second National Bank, St. Paul, Minn. Received from the owner of policy No. 692,465, $286 in cash, and his note at six months for $860, which continues said policy in force until the 16th day of September, 1897, at noon, in accordance with its terms and conditions, provided the above note is paid at maturity, and this receipt is signed by

"J. A. Campbell, *Cashier*."

The note matured March 16, 1897, when it was surrendered to Banholzer, and he paid to the defendant $241.50 in cash, and executed and delivered to the defendant a new note in terms exactly similar to the first note, except that it was payable in sixty days from date. This note was never paid.

On May 28, 1897, Banholzer was taken sick, and died on July 5, 1897.

On June 18, 1897, Banholzer, through his attorney, sent a

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draft to the defendant for the sum of $690, being the amount due on the note of March 16 of that year, in tender of its payment. The defendant returned the draft, writing by its comptroller that "as policy No. 692,465 — Banholzer — stands lapsed on the books of the company for non-payment of the note described above, we return herewith the draft forwarded in your letter of above date. We shall thank you for an acknowledgment of this enclosure. When writing please refer to this letter by file number."

By the application for the policy the latter was to be construed according to the laws of New York. The statute which is claimed to be applicable is inserted in the margin.[1]

The notice required by the statute was duly given more than fifteen and less than forty-five days prior to September 16, 1896, but no notice was given prior to the maturity of the notes, except the ordinary bank notice.

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[1] No life insurance corporation doing business in this State shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest or instalment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, instalment or portion thereof due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation or by an officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest or instalment or portion thereof then due shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium, by or before the date it falls due, the policy and all payments thereon will become forfeited and void except as the right to a surrender value or paid-up policy, as in this chapter provided.

If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment, and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Laws 1892, c. 690, § 92.

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The insurance company has not returned the note of March 16, 1897, and the record does not show that it has ever been demanded.

By stipulation of the parties, the printed record in *Conway* v. *Phenix Mutual Life Insurance Company*, 140 N. Y. 79, together with briefs of counsel, were made part of the record, as though they had been introduced in evidence, and it was also stipulated that they should be certified to this court.

At the close of the plaintiff's testimony the case was dismissed. Subsequently a motion for a new trial was made and denied, and an appeal was then taken to the Supreme Court of the State, which affirmed the decision of the trial court. A reargument was granted, and the court adhered to its opinion. 74 Minn. 387.

The case is here on writ of error, and defendant in error moves to dismiss for want of jurisdiction, or to affirm the judgment.

Mr. Christopher Dillon O'Brien for plaintiff in error submitted on his brief.

Mr. George C. Squiers for defendant in error. *Mr. F. W. M. Cutcheon* was on his brief.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court.

The case is here on a single question. The counsel for plaintiff in error says:

"While originally other questions were raised by the plaintiff they were determined adversely to her and her case made to stand or fall solely upon the interpretation of the New York statute, and the question now before this court is, did the court below in the case at bar give to the statute such full faith and credit as is secured to it by the Constitution of the United States."

That question, therefore, is made the ground of our jurisdiction. The defendant in error challenges its sufficiency, and

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moves to dismiss because the Supreme Court of Minnesota did not deny the validity of the New York statute, but only construed it, and, even granting the construction was erroneous, faith and credit were not denied to the statute. *Glenn* v. *Garth*, 147 U. S. 360, and *Lloyd* v. *Matthews*, 155 U. S. 222, are cited.

Those cases sustain the distinction which defendant in error makes, and the deduction from it, and our inquiry will therefore be: Did the Supreme Court of the State of Minnesota deny the validity of the New York statute or only consider its operation and effect? The claim of the defendant in error is that each of the notes was an "instalment or portion of the premium," and that, therefore, the Supreme Court of Minnesota, in holding that the notice prescribed by section 92 was not necessary to be given prior to the maturity of the notes, denied full faith and credit to the statute.

We dispute the conclusion without passing on the premises. The ruling was a construction of the statute, not a denial of its validity, and that the court meant no more, and meant to follow, not oppose, the decisions of the State, is evident from its opinions.

The first opinion was put on the authority of *Conway* v. *Insurance Co.*, 140 N. Y. 79, on the assumption that its facts were not different from those of the case at bar. In the second opinion the construction of the New York statute was considered as *res integra*, and it was held that "the notice required by it was not applicable to the notes given by Banholzer for part of the September premium."

In the first opinion, the contention that the "premium notice" required by the statute applied to the note, which fell due March 16, 1897, and that the policy could not be forfeited without such notice, the learned justice who spoke for the court said:

"Even if the question was *res nova*, I am clearly of the opinion that, upon the facts, this statutory provision has no application to this note. But as my brethren do not agree with me in this, it would be useless for me to enter into any discussion of the reasons for my opinion. The parties mutually agreed

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that this should be deemed a New York contract and construed according to the laws of that State. The decisions of the highest court of that State as to the construction of such a contract and of the statutes of New York must, therefore, be accepted as conclusive upon the parties. In *Conway* v. *Insurance Co.*, 140 N. Y. 79, upon a state of facts and under a statute which, in our opinion, are in no way distinguishable from those involved in the present case, the Court of Appeals held that the notice required by statute did not apply to the notes; that the company having served that notice before the premium became due, no further notice was required. Counsel for the plaintiff do not claim that the facts of the two cases are in any respect distinguishable, but they seek to draw a distinction between the language of the statute considered in the *Conway* case and the statute applicable to the present case. The statute under consideration in the former was Laws of N. Y., 1876, ch. 341, as amended by Laws, 1877, ch. 321; the statute applicable to the present case is Laws of N. Y., 1892, ch. 690, sec. 92. This last act appears to be a compilation and revision of all the insurance laws of the State, and section 92 but an embodiment (with certain amendments) of the provisions of the act of 1876 as amended in 1877. We have compared the language of the two acts, and are unable to discover any difference between them that at all affects the question now under consideration.

"Even if 'the one month's grace' allowed by the policy for the payment of the premium was applicable to the notes, (which I do not think is,) that fact would not aid the plaintiff, for the insured did not offer to pay the last note until thirty-three days after it matured."

In the second opinion the court said that it had overlooked that counsel had claimed the case to be distinguishable on the facts from the *Conway* case; but on reëxamining the *Conway* case it further said that the question of notice might have been disposed of on the ground of want of power of the agent of the insurance company to accept a note—

"But we are now equally well satisfied that in what the court said on the subject of notice in the last part of the opinion it intended to and did decide the question upon the assumption

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that the company was bound by the agent's acceptance of a time note for the premium. This is made quite clear to our minds from an examination of the record and briefs in the case, copies of which have been furnished us by counsel for the defendant.

"While this shows the views of the Court of Appeals upon the construction of the statute, the doubt in our minds is whether, under the circumstances, it is a decision of the question which is binding on us. See *Carroll* v. *Carroll*, 16 How. 275–286 and 287.

"We shall not decide that question, as we are satisfied that if the construction of the New York statute is to be considered as *res integra* the notice required by it was not applicable to the notes given by Banholzer for part of the September premium. The statute was no doubt enacted for the benefit of the insured, recognizing the fact that they were very often people who were neither experts nor systematic in business matters, and therefore liable to overlook or forget the due days of their premiums according to the terms of their policies, issued perhaps years before, laid away and seldom examined or referred to. And while courts are usually liberal in protecting the assured against forfeitures, this is always done in the interest of justice, and is no reason why any strained or forced construction should be placed upon this statute which would be unreasonable or operate oppressively upon the insurers or which was not within the legislative intent."

The plaintiff in error, however, assails the conclusions of the court. It asserts the court erred in its construction of the *Conway* case, and erred in its independent construction of the New York statute.

Granting, *arguendo*, the correctness of both assertions, the validity of the statute was not denied. Its validity and authority were declared and its meaning was first sought in a decision of the New York courts, and then confirmed by an independent case and construction.

We think, therefore, that the cases of *Glenn* v. *Garth* and *Lloyd* v. *Matthews*, *supra*, apply, and on their authority the action should be

Dismissed for want of jurisdiction.

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DESERANT *v.* CERILLOS COAL RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 269. Argued April 27, 1900.—Decided May 28, 1900.

The act of Congress of March 3, 1891, concerning coal mines, makes three requirements: (1) Ventilation of not less than fifty-five feet of pure air per second, or 3300 cubic feet per minute for every fifty men at work, and in like proportions for a greater number; (2) proper appliances and machinery to force the air through the mine to the face of working places; (3) keeping all workings free from standing gas; and if either of these three requirements was neglected, to the injury of the plaintiff's intestates, the defendant was liable.

The act does not give to mine owners the privilege of reasoning on the sufficiency of appliances for ventilation, or leave to their judgment the amount of ventilation that is sufficient for the protection of miners.

It does not allow standing gas, but requires the mine to be kept clear of it, and if this is not done the consequence of neglecting it cannot be excused because some workman may disregard instructions.

It is the master's duty to furnish safe appliances and safe working places, and if the neglect of this duty concurs with that of the negligence of a fellow-servant, the master is liable.

On the issues made, and on the evidence, and regarding the provisions of the act of Congress, the instructions given by the trial court to the jury were erroneous.

THE case is stated in the opinion of the court.

Mr. Neill B. Field for plaintiff in error. *Mr. F. W. Clancy* was on his brief.

Mr. Robert Dunlap for defendant in error. *Mr. E. D. Kenna* and *Mr. R. E. Twitchell* were on his brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This action is consolidated of three, brought by plaintiff in error, who was plaintiff in the court below and may be so called

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here, as administratrix of the estates respectively of her husband, Henri Deserant, and her sons Jules Deserant and Henri Deserant, Jr.

The actions were for damages for the deaths of her said intestates by an explosion in a mine owned by defendant, and which explosion was alleged to have been caused by the negligence of plaintiff in error. The action was based upon a statute of New Mexico, which gives an action for damages to the personal representatives of a person whose death is caused by the wrongful act of another, if the person causing the injury would have been liable to an action for damages if death had not ensued.

There were two trials, both by jury, in the District Court of the Territory. The first resulted in a verdict and judgment for plaintiff. They were reversed by the Supreme Court of the Territory. 49 Pac. Rep. 807. The second resulted in a verdict and judgment for defendant. They were affirmed by the Supreme Court of the Territory. 55 Pac. Rep. 290. This writ of error was then sued out.

There is no dispute about the explosion or that the deaths of plaintiff's intestates were caused by it. The dispute is as to the cause of the explosion and the responsibility of defendant for it.

The evidence presents long and elaborate descriptions of the mine, with its "slopes, air shafts, entries, cross cuts, air courses, conduits and break throughs."

We do not think that it is necessary to repeat the descriptions. There is no controversy about them. The issue between the parties is as to the amount and sufficiency of ventilation, its obstruction, the accumulation of explosive gases, their negligent ignition, whether by a fellow-servant of plaintiff's intestates or by a representative of the defendant, making it liable, or whether the explosion was of powder accidentally ignited.

The method of ventilation was by machinery causing a circulation of air through the mine and up to the face of the working places, for the purpose of rendering harmless or expelling the noxious gases.

It is contended by plaintiff that the machinery was insufficient for that purpose, the employés of the defendant were in-

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efficient and negligent, and that the air shafts had been permitted to become obstructed, whereby gases accumulated, and stood in the mine and exploded on the 27th of February, 1895, causing the deaths of plaintiff's intestates.

The means of ventilation was a fan at the entrance of the mine, which by its revolutions exhausted the air in the mine, and outside air rushed in and through the passages of the mine, and was directed where desired by means of curtains called "brattices."

It is claimed there were defects in those appliances, whereby there were leaks in the circulation of the air, and besides that water had been allowed to accumulate in the fourth left air course, which so interrupted the quantity of air which passed into room 8 of the fourth left entry that the air did not go to the face of that room, but feebly passed around the brattice at a distance of twelve or fourteen feet, thus permitting the accumulation of a dangerous body of gas, until it passed beyond the danger signals, which may have been put into the room by the fire boss, and that Donahue, the day foreman, and Flick and Kelly, all miners, entered the room on the day of the explosion, with naked lamps, and ignited the gas before they saw or had an opportunity to see the danger signal. The employés of the mine consisted of miners, rope riders, mule drivers, track men and "company men." The latter were paid by the day, and worked under the order and immediate supervision of the foreman or pit boss, while the miners were paid by the ton, and were subject to general supervision by the foreman. Besides these, there was a mine superintendent, day foreman or pit boss, night foreman or pit boss, day fire boss and night boss. There was also a mine inspector, who lived in Kansas, and periodically visited the mine and other mines owned by defendant.

It is claimed that the mine foreman and fire bosses knew of the gas in room 8, and that the deceased miners did not know it, nor have means of knowing it.

The mine was inspected day and night respectively by the day and night fire bosses, and it was the duty of each to advise each miner as he came in of the condition of his working place, and no miner was permitted into the mine to work until so advised.

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The gas is explosive when mixed with certain proportions of atmospheric air. It is lighter than air, and, therefore, dispelled by a current of air, and this was the means necessary to be employed to disperse the gas. The gas when it explodes moves against the opposing current of air. In other words, expends its force in the direction from which the air comes.

On Sunday night Kilpatrick, the foreman, discovered enough gas in room 8 to crack his safety lamp, but he did not regard it as sufficient to mark the place dangerous.

On Monday morning (the explosion was on Wednesday) the day fire boss found gas in room 8, and put a danger mark above the last cross cut, but did not go back to the room again, although he knew that it was one of the worst rooms in the mine for gas. He testified that he considered the danger mark sufficient.

On Monday night before the explosion, Ray, the night fire boss, was at the face of room 8, and found no fire marks, but found a little gas, and put fire marks in the room. He inspected the mine on Tuesday, but did not visit room 8.

Donahue, mine foreman, Flick and Kelly, two "company men," were killed by the explosion, and their bodies were found in or near room 8.

The conclusion, which plaintiff claimed to be established by the evidence, is that Flick and Kelly went with Donahue, under whose direction they worked, into room 8 with naked lights, and that an explosion was caused by the gas in the room coming in contact with the lights.

The defendant, on the contrary, contended that the "explosion was of some kind or other at or in the neighborhood of room 16 in the fourth left entry of the mine, where the deceased were working as coal miners." It is claimed that the cause of the explosion is altogether of conjecture and surmise, and that the greatest evidence or effect of explosion and fire appeared in the neighborhood of rooms 16 and 17, in the entry way thereabout, and that some powder cans were found exploded, and coal dust was found coked on some of the pillars on the back of a car, and a car loaded with coal was moved several feet off the track. It is hence conjectured that the explosion

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was caused by some negligent or accidental ignition of powder which instantly set fire to the coal dust, which more or less impregnated the air and the entry ways, and of particles of gas which might be found in the hollows and crevices; so that death would be caused by concussion, or by the after damp caused by the explosion. Or it is conjectured again that the explosion might have been caused by some miner, while working, suddenly striking a seam or body of gas, which was ignited by his light, and thus ignited powder near at hand.

At the close of the testimony the plaintiff and the defendant asked for peremptory instructions for their respective sides, which were refused.

The assignments of error are based on exceptions to evidence and on exceptions to instructions.

In passing on the case the Supreme Court of the Territory said that it was "unnecessary for us to consider the objections urged to the instructions given by the court below. In our opinion they were all in favor of the plaintiff, as the court should have granted the motion of the defendant, and instructed the jury to find the defendant not guilty."

In support of this conclusion it stated the theory of the plaintiff to be that the explosion was caused by an "accumulation of water previous to the explosion in a low place in the fourth left air course, a sufficient quantity of pure air was not going to the face of the workings in the fourth left entry to remove and expel the noxious gases; that Kelly and Flick, who were company men — that is, men who were paid by the day and not according to what work they did — acting under instructions from Donahue, the day pit boss, went with him or by his direction into room 8 to remove a railroad track, carrying naked lights, and that such lights set fire to the gas which had accumulated there by reason of the insufficiency of air, and caused the explosion. This theory is purely speculative, and is not supported by the evidence. It cannot be positively proved what was the initial point of the explosion or what caused it. In fact, the evidence goes to show, from measurements taken at various times by the superintendent of the mine, the pit boss and the United States inspector, that sufficient air was going through the fourth left

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air course and mine to make it safe. Indeed, the evidence goes further, and shows that after the explosion and on the day of the investigation by the coroner's jury, and while much of the debris caused by the explosion was still in the fourth left air course, a sufficiency of air was passing through it over the water and debris through the low place, which was claimed by the plaintiff to have been obstructed by water, for the proper ventilation of the entry and its rooms and the expulsion of all harmful gases, and for the men and animals working there at the time of the explosion. There is no evidence that the condition of the fourth left air course was the direct or proximate cause of the explosion, and for the plaintiff to recover this must be proved by a preponderance of the evidence."

The court also held that Flick, Kelly and Donahue were fellow-servants of the deceased; therefore, if the contention of the plaintiff was true, that the gas was ignited by their negligence, the defendant had no cause for action.

We have read the evidence, and we cannot concur with the Supreme Court of the Territory that the trial court "should have granted the motion of the defendant, and instructed to find the defendant not guilty." It was for the jury to determine from the evidence the place of the explosion and its cause, and what, if any, negligence the defendant was guilty of, and the evidence offered on the issues required the submission of those questions to the jury.

The effect of the act of Flick, Kelly and Donahue we will consider hereafter.

The trial court, in giving instructions to the jury, read section 6 of the act of Congress of March 3, 1891, which is as follows:

"By section 6 of an act of Congress, approved March 3, 1891, c. 564, 26 Stat. 1104, it is provided as follows:

"'SEC. 6. That the owners or managers of every coal mine at a depth of one hundred feet or more shall provide an adequate amount of ventilation of not less than fifty-five cubic feet of pure air per second, or thirty-three hundred cubic feet per minute, per every fifty men at work in said mine and in like proportions per a greater number, which air shall by proper

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appliances or machinery be forced through such mine to the face of each and every working place so as to dilute and render harmless and expel therefrom the noxious or poisonous gases, and all workings shall be kept clear of standing gas.'"

The court then instructed the jury as follows:

"If, therefore, the jury believe from the evidence that the defendant, the Cerillos Coal Railroad Company, was operating a coal mine at a depth of more than one hundred feet below the surface of the earth, and that the plaintiff's intestates respectively were employed by the defendant in the operation of said coal mine, it was, by reason of said act of Congress, the duty of the defendant to provide an adequate amount of ventilation of not less than thirty-five cubic feet of pure air per second and thirty-three hundred cubic feet per minute for every fifty men who worked in said mine, which air should have been, by proper appliances or machinery, forced through such mine to the face of each and every working place therein, so as to dilute and render harmless and expel therefrom the noxious or poisonous gases, and all workings of such mine should have been kept clear of standing gas in dangerous quantities; and if the jury believe from the evidence that the defendant, the Cerillos Coal Railroad Company, failed or neglected to provide an adequate amount of ventilation so as to dilute and render harmless and expel from the said mine the noxious poisonous gases which were generated therein, or to keep the working places of said mine clear of standing gas, such failure on the part of the defendant may be considered by the jury as evidence of negligence on the part of the defendant.

* * * * * * * *

"9. Negligence is defined to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attending circumstances. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit

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or employers of laborers therein. All occupations producing articles or works of necessity, utility or convenience, may undoubtedly be carried on and competent persons familiar with the business and having sufficient skill therein, may properly be employed upon them, but in such cases where the occupation is attended with danger to life or limb, it is incumbent on the promoters thereof, and the employers or others thereon, to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect from which injury follows to the persons engaged, such promoters and employers may be held responsible and mulcted to the extent of the injury inflicted, if any. Occupations, however important, which cannot be conducted without necessary danger to life, body or limb, should not be prosecuted at all without reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition of their pursuit without such safeguards. Indeed, it may be laid down as a legal principle that in all occupations attended with great and unusual danger, there must be used all appliances readily attainable known to science for the prevention of accidents, and that a neglect to provide such readily attainable appliances, and to keep the same in fit and suitable condition, will be regarded as proof of culpable negligence.

"10. I charge you, gentlemen, that it is the duty of the master to use reasonable care and diligence to provide a reasonably safe place in which his servants shall perform their respective duties, and also to use reasonable care and diligence to provide reasonably safe appliances for the protection of his servants, and to use reasonable care and diligence to keep such appliances in a reasonably safe condition for the protection of his servants; and the master cannot, by the delegation of any part of his duty to an agent, or servant, relieve himself of responsibility for injuries to his servants arising from the neglect of this duty. Any agent or servant of the master, appointed by him for the purpose of looking to the safety of such appliances without regard to the rank or station of such agent, or servant, is the representative of the master for such purpose,

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and the negligence of any such agent or servant in such matters is, in contemplation of the law, the negligence of the master, and the master is liable for any damage occasioned thereby.

"11. Although you may believe from the evidence that the fellow-servants of the deceased by their negligence contributed to the bringing about of the explosion in which deceased were killed, yet, if you also believe from the evidence that the negligence of defendant also contributed to the same result, you must find a verdict in favor of the plaintiff, unless you believe from the evidence that plaintiff's intestates, or one of them, knew, or had means of knowledge, of such negligence of defendant, and notwithstanding such knowledge, or means of knowledge, continued to work in the mine of defendant.

"12. The law requires that the defendant shall keep the workings in its mine clear of standing gas, and if you believe from the evidence the defendant failed to keep the workings in its mine clear of standing gas, and that such failure contributed to the deaths of the deceased, then you are justified in believing defendant guilty of negligence and you must find a verdict in favor of the plaintiff, unless you believe from the evidence that the plaintiff's intestates or one of them knew of the existence of such gas and continued to work in the mine of defendant with such knowledge.

"13. If the jury believe from the evidence that the plaintiff's intestates knew or had reason to know that dangerous bodies of gas were permitted to accumulate in the open places of defendant's mine and to remain for a period of thirty-six hours or more, without any effort on the part of the agents and the servants of defendant to move the same, and that no precautions against the explosion of such gases were accustomed to be taken except to mark the open place were such gas might be with a danger mark, and plaintiff's intestates, notwithstanding such knowledge or means of knowledge, continued to work in said mine, the plaintiff's intestates thereby assumed the risk incident to such method and cannot recover if their fellow-servants ignited such gas by going over or disregarding such fire mark.

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"14. If you believe from the evidence that the explosion originated in room 8 of the fourth left entry of the mine in consequence of the accumulation in said room of a body of dangerous gas, merely guarded by a fire mark or danger signal for thirty-six or forty-eight hours before the explosion, and that plaintiff's intestates did not consent or agree to work in said mine with places dangerous because of gas merely guarded by fire marks or danger signals for thirty-six or forty-eight hours, then plaintiff is entitled to recover in each case, although you may also believe that said body of dangerous gas was ignited by the negligence of fellow-servants of plaintiff's intestates."

The main charge of the court was not objected to. The objections were to certain instructions given at the request of the defendant.

They were as follows:

"1. The jury are instructed that what was required of the defendant in the conduct of its mining business, in caring for the miners employed by and engaged in working its mine, was the adoption and use of appliances and methods reasonably sufficient for the protection of the miners against any dangers attending the operation of its mine, that were obvious or might with reasonable diligence have become known; and in the absence of evidence to the contrary, it is presumed that the defendant performed its entire duty towards the miners in that respect."

"6. Although the jury may believe from the evidence that gas of the quantity mentioned in the evidence had accumulated and was allowed to remain in room 8 for the time stated in the evidence, and believe from the evidence that the explosion testified to originated in room 8, and further believe from the evidence that signals of the kind described in the evidence warning against entry into said room were placed in such a manner as to be observed by the deceased Flick and Kelly, and the meaning and significance of such signal was understood by them, and such signal was known to be in use by the miners engaged in working in said mine, and that the use of such signal was understood by such miners to inform them of the presence of gas in dangerous quantity; then, if the jury believe from the evidence that such explosion was caused by Flick and Kelly

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entering said room with a naked light, the defendant is entitled to, and you should render, a verdict in its favor."

"10. The burden of showing negligence on the part of the defendant, that caused the death of the persons for which this action is brought is upon the plaintiffs, and evidence has been introduced for the purpose of showing an obstruction of the air course through which that portion of the mine where the deceased persons worked was ventilated. The presumption is that the mine was properly and sufficiently supplied with air, unless the evidence offered establishes the contrary, and to do this the jury must find not only a partial obstruction of the air course, but that the obstruction was of such a nature and to such an extent as to prevent the passage of the necessary quantity of air, and if upon the whole testimony the jury believe that notwithstanding the partial obstruction existed, there still was space enough in the air course unobstructed to allow the proper and sufficient ventilation of the mine and of the fourth left entry where such deceased persons were at work, you will find a verdict for the defendant, unless you find from the evidence that the negligence of the defendant in some other way caused or contributed to the death of such persons.

"11. If the jury shall believe from the evidence that the defendant permitted fire gas to accumulate in room 8 of its mine, and that such gas would not produce any injury until ignited, and that it was ignited by Flick and Kelly, or either of them, by going into the said room with a naked light, (contrary to the rules and orders of the defendant,) and by such naked light the fire gas was ignited and exploded, causing the death of plaintiff's intestates, such explosion and injury were directly and immediately caused by the act of the fellow-servants of plaintiff's intestates, and not by the negligence of defendant, and defendant is not liable therefor; and a verdict should be rendered for the defendant."

The act of Congress makes three requirements —

(1) Ventilation of not less than fifty-five feet of pure air per second, or 3300 cubic feet per minute, for every fifty men at work, and in like proportions for a greater number; (2) proper appliances and machinery to force the air through the mine

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to the face of working places; (3) keeping all workings free from standing gas. If either of these three requirements was neglected, to the injury of plaintiff's intestates, the defendant was liable.

We think the instructions numbered 1, 6 and 11, given at the request of the defendant, ignored the obligations of the act of Congress, and are so far inconsistent with the other instructions that they tended to confusion and misapprehension — making the duty of the mine owner relative, not absolute, and its test what a reasonable person would do, instead of making the test and measure of duty the command of the statute. The act of Congress does not give to mine owners the privilege of reasoning on the sufficiency of appliances for ventilation or leave to their judgment the amount of ventilation that is sufficient for the protection of miners. It prescribes the amount of ventilation to be not less than fifty-five cubic feet per second; it prescribes the machinery to be adequate to force that amount of air through the mine to the face of every working place. Nor does it allow standing gas. It prescribes on the contrary that the mine shall be kept clear of standing gas. This is an imperative duty, and the consequence of neglecting it cannot be excused because some workman may disregard instructions. Congress has prescribed that duty and it cannot be omitted, and the lives of the miners committed to the chance that the care or duty of some one else will counteract the neglect and disregard of the legislative mandate.

But aside from the statute, it is very disputable if the instructions were correct. It is undoubtedly the master's duty to furnish safe appliances and safe working places, and if the neglect of this duty concurs with that of the negligence of a fellow-servant, the master has been held to be liable. *Clark* v. *Soule*, 137 Mass. 380; *Cowan, Administrator*, v. *The Chicago, Milwaukee & St. Paul Railway Co.*, 80 Wis. 284; *Sherman* v. *The Menominee River Lumber Co.*, 72 Wis. 122. See also *Hayes* v. *Michigan Central Railroad Co.*, 111 U. S. 228; *Atchison, T. & S. F. R. Co.* v. *Reesman*, 19 U. S. App. 596; *Sommer* v. *Carbon Hill Coal Co.*, 59 U. S. App. 519; *Flike* v. *Boston & Albany Railroad*, 53 N. Y. 550; *Booth* v. *Railroad Co.*,

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73 N. Y. 38; *Grand Trunk Railway Co.* v. *Cummings*, 106 U. S. 700.

The principle was stated in the general charge of the court, but it was materially modified in the application, and not at all considered in giving the instructions requested by the defendant.

No exceptions, however, were taken to any portion of the general charge of the court, and no question arising thereon is open to our review on this writ of error. But as we remand the case for a new trial on account of the errors which we have pointed out irrespective of the general charge, we deem it best to say that we must not be understood as affirming anything contained in instructions numbered 11 and 12, or any other instruction which conflicts with the principles announced in *Texas & Pacific Railway Co.* v. *Archibald*, 170 U. S. 665, 671.

We do not intend to express an opinion as to the facts of the case, or of any fact, or of any of the theories of the explosion. We only mean to decide that on the issues made and on the evidence, and regarding the provisions of the act of Congress, the instructions given by the trial court to the jury were erroneous.

The judgment of the Supreme Court of the Territory is reversed, and the case remanded with instructions to reverse the judgment of the District Court and direct a new trial.

In re CONNAWAY AS RECEIVER OF THE MOSCOW NATIONAL BANK.

ORIGINAL.

No. 9, Original. Submitted April 9, 1900.—Decided May 28, 1900.

A national bank was closed by order of the Comptroller of the Currency and a receiver appointed. An assessment was made upon the holders of stock. Overton and Hoffer were among those who were assessed, and payment not having been made, suit was brought against them. Service

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was made upon H., but not upon O., who was very ill, and who died without service having been made upon him. He left a will, under which J. P. O. was duly appointed his executor. The executor was summoned into the suit by a writ of *scire facias*. A motion was made to set aside the *scire facias* and the attempted service thereof, which motion was granted. The executor being substituted in the place of the deceased as defendant, the court decided that it had acquired no jurisdiction over the deceased, and could acquire none over his executor. Thereupon the receiver applied to this court for a writ of mandamus to the Judges of the Circuit Court of the United States for the Ninth Circuit commanding them to take jurisdiction and proceed against J. P. O. as executor of the last will and testament of O., deceased, in the action brought by the receiver to recover the assessments. *Held:*

(1) That mandamus was the proper remedy, and the rule was made absolute;

(2) That the action of the Circuit Court in setting aside the *scire facias* was here for review;

(3) That *scire facias* was the proper mode for bringing in the executor, and under Rev. Stat. § 955, it gave the court jurisdiction to render judgment against the estate of the deceased party in the same manner as if the executor had voluntarily made himself a party.

THE case is stated in the opinion.

Mr. W. L. Hillyer, *Mr. Curtis Hillyer* and *Mr. Olin L. Berry* for petitioner.

Mr. W. H. Anderson and *Mr. Jesse W. Lilienthal* for respondents.

MR. JUSTICE MCKENNA delivered the opinion of the court.

THIS is a petition for a writ of mandamus to the Judges of the Circuit Court of the United States for the Ninth Circuit and District of California, which substantially shows as follows:

The Moscow National Bank of Moscow, Idaho, was a corporation organized under the national banking laws of the United States, with its place of business at Moscow, Idaho.

The bank, becoming insolvent, was closed by order of the Comptroller of the Currency of the United States, and taken control of by that officer.

On January 3, 1898, he appointed petitioner receiver of the bank's assets.

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Opinion of the Court.

On June 14, 1897, the Comptroller made an assessment of one hundred dollars on each share of the capital stock of the bank, and ordered the stockholders to pay the same on or before July 14, 1897. O. P. Overton and C. A. Hoffer were owners of one hundred shares, and by the assessment became indebted to petitioner in the sum of $10,000, with interest from June 14, 1897.

On March 28, 1898, petitioner commenced an action in that court against said Overton and Hoffer for the said sum of $10,000, and caused a summons to be issued, directed to them as defendants, and placed it in the hands of the marshal for service.

Service was made in the usual form by the marshal on Hoffer personally, in Santa Rosa, in said district.

As to Overton, the marshal made the following return on the 5th of April, 1898: "I hereby certify that I was unable to make personal service on O. P. Overton, as he was very sick, and was not permitted to see any one, under instructions of his physicians."

On April 13, 1898, O. P. Overton died without service having been made upon him.

He made a last will and testament, appointing John P. Overton executor thereof, which was duly probated, and letters testamentary were duly issued.

On March 15, 1899, these facts were brought to the notice of the Circuit Court, and petitioner moved for and obtained an order directing that a writ of *scire facias* issue to said John P. Overton, which concluded as follows: "You are hereby commanded within twenty days after the service upon you of this writ to appear and become a party to this suit, according to the provisions of section 955 of the Revised Statutes of the United States, or show cause why you should not, otherwise judgment may be taken against the estate of said deceased in like manner as if you had voluntarily made yourself a party."

The writ was duly served and a motion was noticed for April 17, 1899, for an order setting aside the *scire facias* "and the attempted service thereof."

The ground of the motion was that "Overton died before the

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service upon him of any process, that no process was ever served upon him herein, and that this action was never pending against him; and upon such other grounds as to the court may seem proper."

The motion was granted, and the petitioner allowed an exception.

On June 12, 1899, upon the suggestion of the death of defendant O. P. Overton, the court made an order substituting John P. Overton as executor of the last will and testament of O. P. Overton, deceased, as defendant, and ordered an alias summons to issue to him as executor.

The summons was duly served, and on August 11, 1899, he by his attorneys, filed and served a notice of motion to set aside the order of substitution and quash the alias summons, on the ground "that said O. P. Overton died before the service upon him of any process herein; that said alleged alias summons is not in the form required by law, and upon such other grounds as to the court may seem proper."

The matter coming on to be heard on November 20, 1899, and having been submitted, it was granted on December 4, 1899, and petitioner was allowed an exception.

The petition for a writ of mandamus alleges that the ground upon which said court set aside the service of summons was that the action had abated by the death of O. P. Overton before the service of process upon him; and prays that a writ of mandamus be issued to the judges of the Circuit Court of the United States aforesaid to take jurisdiction and proceed against John P. Overton as executor as aforesaid.

A rule to show cause was granted. The return thereto by the learned Judge of the Circuit Court admits that the allegations of the petition as to the proceedings had in the Circuit Court are true, except that the court "has not refused to take jurisdiction of the action therein referred to, but only of the person of John P. Overton, executor of the last will and testament of O. P. Overton, the deceased defendant in said action." And the return alleged that the grounds upon which the court set aside the service of the alias summons were stated in the opinion of the court. 98 Fed. Rep. 574.

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The basis of the opinion is that the court had acquired no jurisdiction over the deceased defendant O. P. Overton, and could acquire none over his executor, John P. Overton.

1. It is objected that mandamus is not the proper remedy. Counsel say: "This is not a case in which the court refuses to entertain jurisdiction. The action has not been dismissed. It is still pending in the Circuit Court, and may, and doubtless will, proceed to final judgment." But final judgment against whom? Not against O. P. Overton, for he is deceased. Not against John P. Overton or the estate he represents, because he has not been made a party to the action, and judgment against Hoffer alone may not be all of petitioner's remedy. If the court's ruling is erroneous, how can it be redressed by an appeal from the judgment, Overton not being a party to the action? The court declined to make him a party on the ground that it had no jurisdiction to do so. If it has jurisdiction, mandamus is the proper remedy. *Grossmayer, Petitioner*, 177 U. S. 48. Whether the court had jurisdiction we will proceed to consider.

2. The return of the rule to show cause is confined to the action of the Circuit Court on the alias summons. But its action for setting aside the writ of *scire facias* is also here for review.

Section 955 of the Revised Statutes of the United States provides as follows:

"When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause, and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is pending, twenty days beforehand, neglects or refuses to become a party to the suit, the court may render judgment against the estate of the deceased party in the same manner as

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if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance until the next term of said court."

It is preliminarily urged against this section that it "applies only where an action is 'brought in a Federal court, and is based upon some act of Congress, or arises under some rule of general law recognized in the courts of the Union;' that in such an action 'the question of revival will depend upon the statutes of the United States relating to the subject;' but that otherwise it depends upon the laws of the State in which it is commenced." *Martin* v. *B. & O. Railroad*, 151 U. S. 673; *B. & O. Railroad* v. *Joy*, 173 U. S. 226, are cited.

In those cases the controversy was over the survival of the action; in the pending case that is not the controversy. It is not contended that the action does not survive. It is only contended that personal jurisdiction was not obtained of O. P. Overton before his death, and that, therefore, his executor, John P. Overton, could not be brought into the action, either by *scire facias*, under section 955, Rev. Stat., or by motion suggesting the death of his testate and by alias summons.

In *Schreiber* v. *Sharpless*, 110 U. S. 76, cited in *Martin* v. *B. & O. Railroad*, *supra*, it was decided that "whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it." And that a cause of action on a penal statute of the United States did not survive, even though causes of action on state penal statutes could be prosecuted after the death of the offender.

In *Martin* v. *B. & O. Railroad*, however, the action was for personal injuries, and it was said, "whether the administrator has a right of action depends upon the law of West Virginia, where the action was brought and the administrator was appointed." Rev. Stat. § 721; *Henshaw* v. *Miller*, 17 How. 212. "The mode of bringing in the representatives, if the cause of action survived, would also to be governed by the law of the State, except so far as Congress has regulated the subject." It was determined upon consideration that the cause of action did not survive.

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In *B. & O. Railroad* v. *Joy*, the question was presented in a unique aspect. The action was for personal injuries, which occurred in Indiana, and suit was brought in Ohio. By the laws of the former State the action did not survive; by the laws of the latter, the cause of action did survive. If suit had not been brought before the death of the person injured, the cause of action abated in both States.

The cause was removed to the Circuit Court of the United States, and it was held that the cause of action survived the death of the person injured, and could be revived in the name of his personal representative. We said: "We think that the right to revive attached, under the local law, when Hervey [the person injured] brought his action in the state court. It was a right of substantial value, and became inseparably connected with the cause of action, so far as the laws of Ohio were concerned." And it was denied that the right to revive was lost by the removal of the case to the Circuit Court of the United States or affected by sec. 955, Rev. Stat. We said further: "Whether a pending action may be revived upon the death of either party and proceed to judgment depends primarily upon the laws of the jurisdiction in which the action was commenced. If an action be brought in a Federal court, and is based upon some act of Congress or arises under some rule of general law recognized in the courts of the Union, the question of revivor will depend upon the statutes of the United States relating to that subject. But if at the time an action is brought in a state court the statutes of that State allow a revivor of it on the death of the plaintiff before final judgment—even where the right to sue is lost when death occurs before any suit is brought—then we have a case not distinctly or necessarily covered by section 955."

By section 955 an executor or administrator of "plaintiff or petitioner or defendant in any suit in any court of the United States," may be made a party by "*scire facias* served from the office of the clerk of the court where the suit is pending."

When can a suit be said to be "in any court of the United States," or said to be "pending" therein? Is not the answer inevitable, from the time the suit is commenced? It cannot be

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pending until it is commenced, and if it continue until the death of the "plaintiff or petitioner or defendant," the requirements of the section seem to be satisfied.

Another inquiry becomes necessary — when is a suit commenced? For an answer we must go to the California statutes. By section 405 of the Code of Civil Procedure, it is provided: "Civil actions in the courts of this State are commenced by filing a complaint." By section 406 summons may be issued at any time within a year, and if necessary to different counties. The defendant may appear, however, at any time within a year. The filing of the complaint, therefore, is the commencement of the action and the jurisdiction of the court over the case. The jurisdiction would undoubtedly continue for a year, and probably afterwards, and a motion to dismiss would probably be necessary to get rid of the case. *Dupuy* v. *Shear*, 29 Cal. 238, 242; *Reynolds* v. *Page*, 35 Cal. 296, 300.

3. It is said, however, that jurisdiction of the person of O. P. Overton had not been obtained prior to his death, and this is undoubtedly true. Service of summons was necessary for that. It was so decided in *Dupuy* v. *Shear*, *supra*; and section 416 of the Code of Civil Procedure provides: "From the time of the service of the summons and of a copy of the complaint in a civil action, where service of a copy of the complaint is required, or the completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him."

It is claimed that this section precludes jurisdiction of "the subsequent proceedings" in the action, unless the summons was served, or, to quote counsel, "the Circuit Court in this instance lacked 'jurisdiction' and 'control' of the 'proceedings,' so far as the defendant Overton was concerned. It was, therefore, absolutely powerless to lay its hands upon the deceased defendant's representative." The contention is claimed to be supported by the construction of similar statutes in Oregon and Minnesota made by their courts. *White* v. *Johnson*, 27 Oregon,

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282, and *Auerbach* v. *Maynard*, 26 Minn. 421. The latter case sustains the contention, and proceeds to the extent of denying the court any jurisdiction to proceed further in the action. *White* v. *Johnson* does not go so far. It cites and follows the Minnesota case to the extent of holding "that the court is without power or authority to take any action looking to the rendition of a personal judgment merely without first obtaining jurisdiction through the service of a summons upon the defendant." But the court did not decide that it had no control of subsequent proceedings, but reduced the question to one of procedure and the necessity of service of the summons before a personal judgment could be taken. The court admitted that the statute provided that no action abated upon the death of the party, and provided that the court might allow the action to be continued on motion, and that such was the practice in New York and in California under similar statutes, and then said: "The statute provides that the court may, at any time within one year after the death of a party, on motion, allow the action to be continued against the personal representative, but no provision is made in a case of this kind, as to the manner of bringing in the substituted party. The court could, therefore, adopt any reasonable procedure that might seem proper, but the service of a valid summons could not be dispensed with. Probably the better practice would have been for the lower court to have required the plaintiff to file a supplemental complaint in the action, showing the death of defendant and the appointment of an executrix, and thereupon to issue an alias summons containing the title of the action after substitution made, and had the same directed to the said Cordelia Johnson. A service of such a summons, together with a copy of the complaint, would undoubtedly suffice to require her appearance, in default of which judgment might have been entered against her. Such a practice and procedure seem reasonable, and well calculated to effect the desired results in an orderly manner." The case was reversed, and sent back for such other proceedings as might be deemed advisable.

It is certain that this case is not authority for the contention that the court had no jurisdiction or control over subsequent

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proceedings. It asserted such jurisdiction, and held that in its exercise "the court could, therefore, adopt any reasonable procedure that might seem proper," provided a summons was served.

But even if *White* v. *Johnson* and *Auerbach* v. *Maynard* concurred in holding that upon the death of a defendant the court could not proceed further in the action, we should, nevertheless, be unable to assent to the doctrine. At common law all actions abated by the death of parties before judgment, and to prevent the application and effect of that principle, section 955, preceded by section 31 of the Judiciary Act of 1789, was enacted, and provisions like that of section 385 of the Code of Civil Procedure of California were also enacted. The section is as follows:

"SEC. 385. An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

This section does not make distinctions dependent upon the stages of the action or proceeding. The action or proceeding only needs to exist, and to distinguish its degrees of progress is certainly to add to the letter of the section.

We are, therefore, disposed to the construction of a similar provision in the Code of Montana, made by the Supreme Court of Montana in *Lavell* v. *Frost*, 16 Mont. 93, not only because the construction is in consonance with the purpose of the statute, but accurate as to its letter.

The action was upon a bill of exchange. Frost, the defendant's intestate, died after the complaint was filed, and the defendant, his administratrix, was substituted in his stead.

The court said: "It does not appear whether Frost was served with summons before his death, but the action was commenced before his death. An action is commenced by filing a

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complaint. (Code Civ. Proc. § 66.) 'An action or defence shall not abate by the death of a party, but shall survive and be maintained by his representatives.' (§ 22.) . . . So far we are of opinion, there was no error in the case."

The procedure in California in case of the death of the defendant before service has not been ruled upon, but in case death occur after service, it was said in *Taylor* v. *Western Pacific R. R. Co.*, 45 Cal. 323, at page 337: "It has been the uniform practice of the State from its organization, so far as we are advised, to permit the substitution to be made, or a suggestion of the death of the former party and satisfactory proof, on an *ex parte* motion, of the appointment and qualification of the administrator."

The same ruling was made in *Campbell* v. *West*, 93 Cal. 653. And the practice was emphasized by contrast with that in case of a transfer of interest otherwise than by death. In such case the court said when the proceedings were set in motion by the plaintiff or the person to whom the transfer is made, or by the defendant if for any reason he desires to avail himself of such transfer for any purpose, it must be made by supplemental complaint or answer.

We see no reason why the representative of a deceased party should not be brought in by the same procedure, whether the death of a party occur before or after service, and the language of the statute so expresses. The court would undoubtedly take care that ample notice was given, and nothing more can be necessary.

The cases in equity cited by petitioner contain some pertinent remarks as to when a suit may be considered as having been commenced, and in what stage of the suit it can be revived against the representatives of a deceased party. The cases cannot be said to be inapplicable to the statutes of States which, like California, have abolished the difference between legal and equitable forms of action, and which, under one form of action and the method of procedure of the State, intend to give, not less, but greater, remedial facilities, and, while accommodating the relief to the circumstances of the case, expedite the relief by freeing it from the delays and expense of the old procedure,

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both in common law and equity, and to obtain the good in both by a simpler practice.

In *Gordon* v. *Tyler*, 53 Mich. 629, 631, the original defendants not having been served before their deaths, the court said, in passing on a motion to set aside the service and dismiss the bill: "The basis of this objection is that until a defendant has appeared the suit cannot be treated as having actually been commenced against him; so that if he dies before appearance it is as if he had never been in the case, and an original bill is necessary to reach his representatives. The citation from Daniells' Chancery Practice seems to favor that idea. But the authorities and practice have uniformly held that the filing of a bill is the commencement of suit for most purposes, and we can see no reason for adopting any exceptional rule in such cases as the present. An affidavit can always be made in a cause as soon as the bill is filed, and sometimes becomes necessary to support an order for the appearance of an absentee. A notice of *lis pendens* may always be filed at once, and it would lead to very serious mischief if a failure to serve process at once on a defendant could nullify the effect of such filing. For many purposes it is not always important whether a bill is a bill of revivor or an original bill in the nature of one. But for some purposes the difference is very material, and rights may be seriously jeopardized by holding a failure to get a defendant in before his death equivalent to a failure to implead him. The evident object of our statute is to hasten the proceedings by allowing a petition to stand in lieu of a bill of revivor, and we do not see any good reason for holding that a suit, if regarded as commenced for any substantial purpose, should not be regarded as commenced, so as to save all rights as against the estates of a deceased defendant, appearing or not appearing. No one's rights are injured by so holding, and important rights may be jeopardized by holding otherwise."

This ruling was reaffirmed in *Stevenson* v. *Krutz*, 57 N. W. Rep. 580.

In Maine, an executor of the deceased defendant may be brought in by bill of revival. In declaring the practice the court said, in *Hubbard* v. *Johnson*, 77 Maine, 139: "The general

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rule in equity is that, strictly speaking, there is no cause in court as against a defendant until his appearance. 2 Dan. Ch. (5th ed.) 1523. But in this State, since a bill may be inserted in a writ of attachment, (Rev. Stat. c. 77, sec. 11,) as this was, and a suit is commenced when the writ is actually made with intention of service, (Rev. Stat. c. 81, sec. 95,) an executor may be brought in by a revivor, although no service has been made on the testator. *Heard* v. *March*, 12 Cush. 580."

The same ruling was made in Massachusetts in *Heard* v. *March*, and while there was no opinion of the court, from the argument of counsel the ruling was apparently based on the same grounds as in *Hubbard* v. *Johnson*, *supra*, to wit, that an action was commenced on the day of the date of the writ, that being the process in chancery.

It was said in *Lyle* v. *Bradford*, 7 T. B. Monroe, 111, 116: "That the suing out process has at all times been held the commencement of an action or suit, and that as to the person against whom process has been issued there must necessarily be a pending suit from the date of the process, so as to abate and require a revival upon his death."

There is nothing in *Lewis* v. *Outlaw*, 1 Tenn. (1 Overton) 140, which opposes these views. Indeed, it affirms them. The court said: "Agreeably to the practice in the courts of law in England, all suits abated by the death of either party; nor could they be revived by *scire facias*." The court then proceeded to say that the practice of chancery in England was upon the death of either plaintiff or defendant to file a bill of revivor against the representatives of the deceased, and applying this practice to Kentucky under a statute which provided no abatement should occur by the death of either the plaintiff or defendant but might be "proceeded upon by application of the heirs, executors, administrators or assigns of either party," said: "It seems clear that all revivals, to comport with the principles of reason and the English practice, should be made by causing appropriate process to issue so as to make the representatives of the deceased parties in a legal manner. To revive a dormant judgment a *scire facias* is necessary. To revive in chancery the authorities show that a bill must be filed, and process issued thereon, to

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which the representatives may make such answer as the nature of the case may require."

Hyde v. *Leavitt, Administrator of Griffin*, 2 Tyler, 170, cited by respondent's counsel, must be considered as peculiar to the practice in Vermont.

The statute of the State was very similar to section 955 of the Revised Statutes of the United States, (*supra*,) and it was held, reversing the lower court, that notwithstanding Griffin, the deceased, had been personally served with the writ, as it was made returnable June term, 1801, and as Griffin died before session day, his administrator could not be made a party under the statute. The ground of the decision seemed to be that the suit could not be considered as *pending* until it was entered in court. The contrary was held in *Clindenin* v. *Allen*, 4 N. H. 385. The same contention was made which was made in *Hyde* v. *Leavitt*. The court decided that, "as the term '*pending*' means nothing more than '*remaining* undecided,' an action may, without doubt, be considered as pending from the commencement." And we may say that *Hyde* v. *Leavitt* did not long remain law in Vermont. At their October sessions, 1804, the General Assembly amended the statute to make the commencement of the suit, in case of the death of either party, the same as to rights for and against executors as existed in a suit which was "*pending*," using this word, no doubt, to meet the ruling of the court.

However, the discussion to the extent we have carried it may not be necessary. Section 955, Rev. Stat., determines when the representative of a deceased party may be brought into an action, and that *scire facias* is the procedure whereby he may be brought in. And it is not confined to a case where a judgment has been obtained. It is a process of notice to the executor or administrator to come in, and if he should not come in, gives jurisdiction to the court to "render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party." This is the language of the section. If doubt there can be of its construction, it is removed by the case of *Green* v. *Watkins*, 6 Wheaton, 260, and *Macker's Heirs* v. *Thomas*, 7 Wheaton, 530.

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In *Green* v. *Watkins*, the court, passing on section 31 of the Judiciary Act of 1789, of which sections 955 and 956, Rev. Stat., are reproductions, pointed out the distinction between the death of parties before judgment and after judgment, and said: "In the former case all personal actions by the common law abate; and it required the aid of some statute like that of the thirty-first section of the Judiciary Act of 1789, c. 20, to enable the action to be prosecuted by or against the personal representative of the deceased, when the cause of action survived."

The enactment of the section was to provide against the abatement of actions which would otherwise abate at common law, and we cannot confine its remedy to the cases where death occurs after judgment. In other words, confine its remedy to the cases where the common law already afforded a remedy. See also *McCoul* v. *Lekamp*, 2 Wheat. 111, and *Hyde* v. *Leavitt*, *supra*.

Except when considering the objection made here to the remedy by mandamus, we have treated the case as if O. P. Overton, the deceased party, was the sole defendant, and that the action necessarily abated unless there was a saving statute. But he was not the sole defendant, and the action did not abate at common law if the cause of action survived against the other defendant. We assume (the record does not enable us to determine absolutely) that it did, and the reason for bringing in the representatives of the deceased defendant is the stronger.

We think, therefore, that the Circuit Court erred in setting aside the scire facias *and the rule for mandamus is made absolute.*

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SMITH *v.* REEVES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 242. Argued April 16, 1900.—Decided May 14, 1900.

Within the meaning of the constitutional provisions relating to actions instituted by private persons against a State, this suit, though in form against an officer of the State of California, is in fact against the State itself.

By § 3669 of the Political Code of California, which provides that any person dissatisfied with the assessment made upon him by the State Board of Equalization, may, after payment and on the conditions named in the act, bring an action against the State Treasurer for the recovery of the amount of taxes and percentage so paid to the Treasurer, or any part thereof, the State has not consented to be sued except in its own courts.

It was competent for the State to couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments made by the state board, the condition that the suit be brought in one of its own courts.

A suit brought against a State by one of its citizens is excluded from the judicial power of the United States, even when it is one arising under the Constitution and laws of the United States, and the same rule applies to suits of a like character brought by Federal corporations against a State without its consent.

THE case is stated in the opinion.

Mr. C. N. Sterry for plaintiff in error.

Mr. Tirey L. Ford and *Mr. William M. Abbott* for defendant in error. *Mr. George A. Sturtevant* was on their brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

THIS action was brought in the Circuit Court of the United States for the Northern District of California by the Receivers of the Atlantic and Pacific Railroad Company, a corporation created under an act of Congress approved July 27, 1866,

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with authority to construct and maintain a railroad and telegraph line beginning at or near Springfield, Missouri, thence by a specified route to the Pacific Ocean. 14 Stat. 292, c. 278.

The original defendant was J. R. McDonald, as Treasurer of the State of California. He was succeeded in office by Levi Rackliffe, W. S. Green and Truman Reeves in the order named.

The relief sought was a judgment against the defendant "*as Treasurer* of the State of California," for the sum of $2272.80 with interest thereon from the date of the payment of that sum or any portion thereof to the State Treasurer, together with the costs of the action.

Before bringing suit the Receivers of the Railroad Company gave written notice to the Comptroller of the State that they intended to bring an action against the State Treasurer to recover from him the amount of the "taxes paid by the Atlantic and Pacific Railroad Company, and by the Receiver for it, to the State Treasurer as and for taxes assessed against the Atlantic and Pacific Railroad Company in the State of California for the year 1893, by the State Board of Equalization."

The action was brought under section 3669 of the Political Code of California, which is as follows:

"Each corporation, person or association assessed by the State Board of Equalization must pay to the State Treasurer, upon the order of the Comptroller, as other moneys are required to be paid into the Treasury, the state and county and city and county taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person or association dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, and the percentage added, if to be added, on or before the first Monday in June, and the filing of notice with the Comptroller of an intention to begin an action, may, not later than the first Monday in June, bring an action against the State Treasurer for the recovery of the amount of taxes and percentage so paid to the Treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the sum-

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mons must be served upon the Treasurer within ten days after the complaint has been filed, and the Treasurer has thirty days within which to demur or answer. At the time the Treasurer demurs or answers, he may demand that the action be tried *in the Superior Court of the county of Sacramento.* The Attorney General must defend the action. The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for. If the final judgment be against the Treasurer, upon presentation of a certified copy of such judgment to the Comptroller, he shall draw his warrant upon the State Treasurer, who must pay to the plaintiff the amount of taxes so declared to have been illegally collected; and the cost of such action, audited by the Board of Examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated, and the Comptroller may demand and receive from the county, or city and county interested, the proportion of such costs, or may deduct such proportion from any money then or to become due to said county, or city and county. Such action must be begun on or before the first Monday in June of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the right of action."

The State Treasurer, represented by the Attorney General of the State, demurred to the complaint upon various grounds affecting the merits of the case, and also moved to dismiss the case upon the ground that the Circuit Court had no jurisdiction of the defendant or of the action.

The demurrer was sustained with leave to amend and the motion to dismiss was denied. *Reinhart* v. *McDonald, Treas'r*, 76 Fed. Rep. 403.

An amended complaint was filed but a demurrer to it was sustained, with leave to amend. No further amendment having been filed, the action was dismissed by the Circuit Court. *Smith* v. *Rackliffe*, 83 Fed. Rep. 983. That judgment was affirmed in the Circuit Court of Appeals. 59 U. S. App. 428.

Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the State, as such, is not made a party de-

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fendant, the suit is against one of its officers *as Treasurer;* the relief sought is a judgment against that officer *in his official capacity;* and that judgment would compel him to pay out of the public funds in the treasury of the State a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the State for the amount specified in the complaint. This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the State and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the State of which he is an officer or agent. *Tindal* v. *Wesley*, 167 U. S. 204, 221, and authorities there cited. In the present case the action is not to recover specific moneys in the hands of the State Treasurer nor to compel him to perform a plain ministerial duty. It is to enforce the liability of the State to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the State from the plaintiffs. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act to the injury of the plaintiffs in their persons or property, but one in effect to compel the State, through its officer, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment.

The case, in some material aspects, is like that of *Louisiana* v. *Jumel*, 107 U. S. 711, 726–728. That was a proceeding by mandamus against officers of Louisiana to compel them to use the public moneys in the state treasury for the retirement of certain bonds issued by the State but which it subsequently refused to recognize as valid obligations and directed its officers not to pay. This court said: "It may be, without doubt, easily ascertained from the accounts how much of the money on hand is applicable to the payment of this class of debts; but the law nowhere requires the setting apart of this fund any more than

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others from the common stock. In the treasury all funds are mingled together, and kept so until called for to meet specific demands. . . . The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power."

We are clearly of opinion that within the meaning of the constitutional provisions relating to actions instituted by private persons against a State, this suit, though in form against an officer of the State, is against the State itself. *In re Ayers*, 123 U. S. 443; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10.

But it is contended that by the section of the Political Code of California above quoted the State has consented that its Treasurer may be sued in respect of the matters specified in that section, and it is argued that this case comes within the decision in *Beers* v. *Arkansas*, 20 How. 527, 529, in which it was said to be an established principle of jurisprudence in all civilized nations that while the sovereign cannot be sued in its own courts or in any other without its consent and permission, a State "may, if it thinks proper, waive this privilege, and permit itself to be

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made a defendant in a suit by individuals or by another State." So in *Clark* v. *Barnard*, 108 U. S. 436, 447: "The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other States."

It is quite true the State has consented that its Treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the State Board of Equalization. But we think that it has not consented to be sued except in one of its own courts. This is not expressly declared in the statute, but such, we think, is its meaning. The requirement that the aggrieved taxpayer shall give notice of his suit to the Comptroller, and the provision that the Treasurer may at the time he demurs or answers "demand that the action be tried in the Superior Court of the county of Sacramento," indicate that the State contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals. If a Circuit Court of the United States can take cognizance of an action of this character, the right given to the Treasurer by the local statute to have the case tried in the Superior Court of Sacramento County would be of no value; for, as the jurisdiction and authority of a Circuit Court of the United States depends upon the Constitution and laws of the United States, it could not refuse to take cognizance of the case if rightfully commenced in it and to proceed to final decree, nor could it, merely in obedience to the laws of the State, transfer it to a state court upon the demand of the State Treasurer. A Federal court can neither take nor surrender jurisdiction except pursuant to the Constitution and laws of the United States.

In *Beers* v. *Arkansas*, above cited, it was further said: "As this permission [to be sued] is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms

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and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. Arkansas, by its constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suit might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objection would have been made to it. The objection is that it was passed after the suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards, if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power the State violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the State consented to be a party defendant."

In support of the broad proposition that the State could not restrict its consent to be sued to actions brought in its own courts, counsel refer to *Railway Company* v *Whitton*, 13 Wall. 270, 286; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391, and *Smyth* v. *Ames*, 169 U. S. 466, 516.

Railway Company v. *Whitton* related to a statute of Wisconsin, giving a right of action, in certain circumstances, where the death of a person was caused by the wrongful act, neglect

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or default of another person or of a corporation, and which statute provided that the action should be brought in some court established under the constitution and laws of the State. This court held that in all cases where a general right was thus conferred, "it can be enforced in any Federal court within the State having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of state legislation that it shall only be enforced in a state court. . . . Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a Federal court in a case between proper parties, is a matter of course, and the jurisdiction of the court, in such case, is not subject to state limitation."

Reagan v. *Farmers' Loan & Trust Co.* was an action by a New York corporation against the railroad commissioners of Texas and others to enjoin the enforcement of certain railroad rates established by the statutes of Texas. This court said: "Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of the State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts."

Smyth v. *Ames* was a suit in the Circuit Court of the United States against the members of the State Board of Transportation of Nebraska and other persons and corporations, to enjoin the enforcement of certain rates established by a statute of that State for railroads. In that case it was insisted that the relief sought could only be had in an action brought in the Supreme Court of Nebraska, such being the remedy provided by the statute there in question. That provision, it was contended, took from the Circuit Court of the United States its

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equity jurisdiction in respect of the rates prescribed, and required the dismissal of the bills. This court said: "We cannot accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States. *Case of Broderick's Will*, 21 Wall. 503, 520; *Holland* v. *Challen*, 110 U. S. 15, 24; *Dick* v. *Foraker*, 155 U. S. 404, 415; *Bardon* v. *Land and River Improv. Co.*, 157 U. S. 327, 330; *Rich* v. *Braxton*, 158 U. S. 375, 405. But if the case in its essence be one cognizable in equity, the plaintiff, the required value being in dispute, may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction. *Payne* v. *Hook*, 7 Wall. 425, 430; *McConihay* v. *Wright*, 121 U. S. 201, 205. A party, by going into a national court, does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals. *Davis* v. *Gray*, 16 Wall. 201, 221; *Cowley* v. *Northern Pacific Railroad Co.*, 158 U. S. 569, 583." In *Smyth* v. *Ames* the court distinctly reaffirmed what was said upon this point in *Reagan* v. *Farmers' Loan & Trust Co.*

These cases do not control the determination of the present question. The *Whitton* suit was wholly between private parties, and involved no question as to the State or the powers or acts of state officers. In the *Reagan* and *Smyth* cases the relief sought was against the proposed action of state officers or

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agents, and they were not in any sense suits against the State—the relief asked being protection against affirmative action about to be taken by state officers in hostility to the rights of the respective plaintiffs.

In the present case the suit was one to compel an officer of the State, by affirmative action on his part, to perform or comply with the promise of the State as defined in its Political Code, and therefore, as we have said, it is a suit against the State. Nothing heretofore said by this court justifies the contention that a State may not give its consent to be sued in its own courts by private persons or by corporations, in respect of any cause of action against it and at the same time exclude the jurisdiction of the Federal courts—subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed or reëxamined, as prescribed by the act of Congress, if it denies to the plaintiff any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States.

In our judgment it was competent for the State to couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments made by the state board, the condition that the suit be brought in one of its own courts. Such legislation ought to be deemed a part of the taxing system of the State, and cannot be regarded as hostile to the General Government, or as touching upon any right granted or secured by the Constitution of the United States. If the California statute be construed as referring only to suits brought in one of its own courts, it does not follow that injustice will be done to any taxpayer whose case presents a Federal question. For, if he be denied any right, privilege or immunity secured by the Constitution or laws of the United States and specially set up by him, the case can be brought here upon writ of error from the highest court of the State.

Again, it is contended that a State cannot claim exemption from suit by a corporation created by Congress—as was the

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Atlantic and Pacific Railroad Company—for purposes authorized by the Constitution and laws of the United States. This contention rests upon the ground that the Eleventh Amendment—which was passed because of the decision in *Chisholm* v. *Georgia*, 2 Dall. 419—only declares that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States "by citizens of another State, or by citizens or subjects of any foreign State," and does not forbid an action against a State by a corporation created by Congress. It is further said that although the present case may not be embraced by the clause of section 2, article III, of the Constitution, extending the judicial power of the United States to controversies "between a State and citizens of another State" and to controversies "between a State, or the citizens thereof, and foreign States, citizens or subjects," this suit having been brought by a Federal corporation created for national purposes, *Osborn* v. *U. S. Bank*, 9 Wheat. 738; *California* v. *Central Pacific Railroad*, 127 U. S. 1; *Northern Pacific Railroad Co.* v. *Amato*, 144 U. S. 465, is embraced by the clause of the same article extending the judicial power of the United States, in express words, "to *all* cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

If the Constitution be so interpreted it would follow that any corporation created by Congress may sue a State in a Circuit Court of the United States upon any cause of action, whatever its nature, if the value of the matter in dispute is sufficient to give jurisdiction. We cannot approve this interpretation.

This question is controlled by the principles announced in *Hans* v. *Louisiana*, 134 U. S. 1, 10, 14, 16–21. That was an action brought in the Circuit Court of the United States by a citizen of Louisiana against that State. It was a case that could be said to have arisen under the Constitution of the United States; and the contention was that the Eleventh Amendment did not exclude from the jurisdiction of the Circuit Court a suit brought against a State by one of its own citizens, provided it was one arising under the Constitution or laws of the United States.

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In the opinion in that case, delivered by Mr. Justice Bradley, reference was made to the question involved in *Chisholm* v. *Georgia*, and to what had been said by leading statesmen, prior to the adoption of the Constitution, in support of the general proposition that sovereignty could not, without its consent, be brought to the bar of any court at the suit of private parties or corporations. This court said: "That a State cannot be sued by a citizen of another State, or of a foreign State, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. *Louisiana* v. *Jumel*, 107 U. S. 711; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443. Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against state officers who professed to act in obedience to those laws. This court held that the suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the Amendment referred to."

Referring to certain observations made by Hamilton, Madison and Marshall, in refutation of the doctrine that States were liable to suits, the court also said: "It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the Federal courts, whilst the idea of suits by citizens of other

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States, or of foreign States, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

Again: "The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. . . . 'It may be accepted as a point of departure unquestioned,' said Mr. Justice Miller, in *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 451, 'that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.' Undoubtedly a State may be sued by its own consent, as was the case in *Curran* v. *Arkansas et al.*, 15 How. 304, 309, and in *Clark* v. *Barnard*, 108 U. S. 436, 447. The suit in the former case was prosecuted by virtue of a state law which the legislature passed in conformity to the constitution of that State. But this court decided, in *Beers et al.* v. *Arkansas*, 20 How. 527, 529, that the State could repeal that law at any time; that it was not a contract within the terms of the Constitution prohibiting the passage of state laws impairing the obligation of a contract. . . . It is not necessary that we should enter upon an examination of the reasons or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence."

The present plaintiffs, as did the plaintiffs in *Hans* v. *Louisiana*, base the argument in support of their right to sue the State in the Circuit Court of the United States upon the mere letter of the Constitution. We deem it unnecessary to repeat

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or enlarge upon the reasons given in *Hans* v. *Louisiana* why a suit brought against a State by one of its citizens was excluded from the judicial power of the United States, even when it is one arising under the Constitution and laws of the United States. They apply equally to a suit of that character brought against the State by a corporation created by Congress. Such a suit cannot, consistently with the Constitution, be brought within the cognizance of a Circuit Court of the United States without the consent of the State. It could never have been intended to exclude from Federal judicial power suits arising under the Constitution or laws of the United States when brought against a State by private individuals or state corporations, and at the same time extend such power to suits of like character brought by Federal corporations against a State without its consent.

The Circuit Court entertained jurisdiction of the cause and dismissed the bill. The Circuit Court of Appeals held that the Circuit Court erred in holding jurisdiction, but affirmed the order of dismissal upon the ground of want of jurisdiction in the latter court to take cognizance of such a case as is here presented. We approve the action of the Circuit Court of Appeals, and its judgment is

Affirmed.

EARLE v. PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 218. Argued April 11, 1900. — Decided May 14, 1900.

An attachment sued out against a bank as garnishee is not an attachment against the bank or its property, nor a suit against it within the meaning of section 5242 of the Revised Statutes.

When the Chestnut Street National Bank suspended and went into the hands of a receiver, the entire control and administration of its assets were committed to the receiver and the comptroller, subject, however, to any rights of priority previously acquired by the plaintiff through the proceedings in the suit against Long.

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Opinion of the Court.

The state court had no authority to order execution in favor of the plaintiff of any dividends upon the money on deposit in the bank to Long's credit at the time the bank was served with the attachment, and direct the sale of the shares of stock originally held by the bank as collateral security.

THE case is stated in the opinion.

Mr. John G. Johnson and *Mr. Asa W. Waters* for plaintiff in error. *Mr. W. H. Addicks* was on *Mr. Waters'* brief.

Mr. James C. Stillwell for defendant in error in No. 219, which was argued with this case.

MR. JUSTICE HARLAN delivered the opinion of the court.

On the 29th day of September, 1897, the Commonwealth of Pennsylvania, at the suggestion and to the use of the Commonwealth Title, Insurance and Trust Company, trustee for Mary Rodgers, obtained judgment upon a bond in the Court of Common Pleas for the county of Philadelphia against one James Long for the sum of $31,499. A writ of attachment issued upon that judgment, and on the 5th day of October, 1897, an alias writ was issued against the Chestnut Street National Bank of Philadelphia, as garnishee. The writ was served on October 28, 1897, and commanded the bank to show cause in that court on a day named why the judgment against Long, with costs of writ, should not be levied on the effects of the defendant in the hands of the bank. Afterwards, on November 6, 1897, special interrogatories were filed by the plaintiff, and a rule was entered requiring the bank, as garnishee, to answer the same within a named time. Subsequently the bank filed its answer in the attachment proceedings, and November 24, 1897, it filed an answer to the special interrogatories; and, on December 15, 1897, a rule was entered by plaintiff for judgment against the bank, as garnishee, on its answers.

A few days later, on the 23d day of December, 1897, the bank suspended payment of its obligations, and by order of the Comptroller of the Currency of the United States closed its

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doors to business; and January 29, 1898, the present plaintiff in error, Earle, was appointed by that officer as receiver of the bank and duly qualified as such.

Subsequently, May 5, 1898, Earle, as receiver, entered his appearance in the above action and filed a suggestion of record setting forth his appointment and qualification, and on the following day filed an affidavit stating his appointment as receiver. On the succeeding day a motion was made and filed (entered as a rule) by the receiver to vacate and dismiss the attachment served upon the bank, garnishee, for want of jurisdiction in the Court of Common Pleas under section 5242 of the Revised Statutes of the United States, the receiver insisting that all the proceedings in attachment against the bank were null and void.

The rule entered December 15, 1897, for judgment against the bank and the rule to vacate and dismiss the attachment for want of jurisdiction in the Court of Common Pleas were heard, and that court, on May 21, 1898, made absolute the rule for judgment and entered the following: "And now, to wit, May 21, 1898, upon the hearing of the attachment in the above case and the interrogatories of the plaintiff and the answer of the garnishee thereto, it is adjudged that the above-named garnishee has a deposit in money belonging to the above-named defendant of $2900, with interest from October 28, 1897; and also that the said garnishee has 77 shares of 'National Gas Trust stock' and 33 shares of the capital stock of the Eighth National Bank of Philadelphia belonging to the said defendant and pledged by him with the said garnishee for payment by him to it of the sum of $17,831, with interest thereon from April 22, 1897, and that the plaintiff have execution of any dividends on the said deposit of $2900, with interest, in common with the other creditors of said garnishee, less $35 counsel fee for the said garnishee's counsel, and that if the said garnishee refuse or neglect, on demand by the sheriff, to pay the same, then the same to be levied of the said garnishee according to law, as in the case of a judgment against it for its proper debt, and also that the plaintiff have leave to issue a writ of *fieri facias* against the above-named defendant for the sale of the said 77 shares of 'National Gas Trust stock' and 33 shares of the capi-

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tal stock of the Eighth National Bank of Philadelphia, pledged by the defendant with the garnishee, subject to the garnishee's claim under said pledge of the sum of $17,831, with interest thereon from April 22, 1897, or so much thereof as shall be necessary to satisfy the plaintiff's judgment against the defendant in this case, with costs."

The rule to vacate and dismiss the proceedings in attachment for want of jurisdiction in the Court of Common Pleas was discharged.

The cause was carried to the Supreme Court of Pennsylvania, where the judgment of the Court of Common Pleas was affirmed.

By the Revised Statutes of the United States it is provided:

"§ 5234. On becoming satisfied, as specified in sections 5226 and 5227, that any [national banking] association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct, and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

"§ 5235. The Comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same and make legal proof thereof.

"§ 5236. From time to time, after full provision has been first made for refunding to the United States any deficiency in

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redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

"§ 5242. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any state, county or municipal court."

Sections 5234, 5235 and 5236 above quoted have reference to the affairs and property of national banks in the hands of receivers and the administration of its assets by the Comptroller; and the words in section 5242, "no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any state, county or municipal court," are to be construed in connection with the previous parts of the same section declaring null and void certain transfers, assignments, deposits and payments made after the commission by the bank "of an act of insolvency, or in contemplation thereof," with the intent to prevent the application of the bank's assets in the manner prescribed by Congress, or with a view to the preference by the

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bank of one creditor to another. Whatever may be the scope of section 5242, an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others. After the Chestnut Street National Bank had been served as garnishee with the attachment sued out in the Long suit but before it went into the hands of a receiver, it admitted in its answers to special interrogations in the suit against Long that it was indebted to Long on a clearing-house due bill, and also that it held as collateral security for his debt to it certain shares of the stock of the National Gas Trust, as well as certain shares of the stock of the Eighth National Bank of Philadelphia. By the service of the attachment upon the bank, the plaintiff in the attachment acquired a right to have the money and property belonging to Long in the hands of the bank applied in satisfaction of its judgment against him, subject of course to the bank's lien for any debt due to it at that time from him. The bank therefore became bound to account to the plaintiff in the attachment for whatever property or money it held for the benefit or to the use of Long at the time the attachment was served upon it. And the right thus acquired by the service of the attachment was not lost by the suspension of the bank and the appointment of the receiver. The assets of the bank passed to the receiver burdened, as to the interest that Long had in them, with a lien in favor of the plaintiff in the attachment which could not be disregarded or displaced by the Comptroller of the Currency.

We must not, however, be understood as holding that the distribution of the bank's assets in the hands of the receiver could have been in anywise directly controlled by the state court or seized under an attachment or execution in the hands of any state officer. On the contrary, the direction in the statute that the receiver pay over all moneys realized by him from the assets of the bank to the Treasurer of the United States, subject to the order of the Comptroller, furnished a rule of conduct for him which neither an order of nor any proceedings in the state court could affect, modify or change. The

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scheme of the statute relating to suspended national banks is that from the time of a bank's suspension all its assets, of whatever kind, as they are at the time of suspension, pass in the first instance, to the receiver, the proceeds thereof to be distributed by the Comptroller among those whose claims are proved to his satisfaction or are adjudicated by some court of competent jurisdiction. So when the Chestnut Street National Bank suspended and went into the hands of a receiver the entire control and administration of its assets were committed to the receiver and the Comptroller, subject, however, to any rights of priority previously acquired by the plaintiff through the proceedings in the suit against Long.

It results that the state court did not err in overruling the motion of the receiver to vacate and dismiss the attachment issued in the suit brought against Long and served upon the bank as garnishee prior to its suspension. The proceedings in the state court prior to the appointment of a receiver were all in due course of law. We do not understand that to be controverted. But we are of opinion that the order of judgment of May 21, 1898, was erroneous in some particulars. As the bank did not cease to exist as a corporation upon its suspension and the appointment of a receiver, it was competent for the state court to determine, as between the plaintiff in the attachment and the bank, what rights were acquired by the former as against the latter by the service of the attachment; and its judgment, thus restricted, could have been brought to the attention of the Comptroller for his guidance in distributing the assets of the bank. To this extent the judgment below is affirmed. But, for the reasons already stated, we hold that the state court had no authority to order execution in favor of the plaintiff of any dividends upon the money on deposit in the bank to Long's credit at the time the bank was served with the attachment, and direct the sale of the shares of stock originally held by the bank as collateral security, but which passed upon the suspension of the bank to the custody of the receiver. This part of the judgment should be set aside. It is proper to say that the rights acquired by the defendant in error under the garnishee proceedings can be made effective upon application

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to the Comptroller, to whom Congress has entrusted the power to distribute the assets of a suspended bank among those entitled thereto.

The decree is reversed to the extent indicated, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

EARLE *v.* CONWAY.

ERROR TO THE SUPREME COURT OF PENNSYLVANIA

No. 219. Argued April 11, 1900. — Decided May 14, 1900.

A receiver of a National Bank may be notified, by service upon him of an attachment issued from a state court, of the nature and extent of the interest sought to be acquired by the plaintiff in the attachment in the assets in his custody; but, for reasons stated in *Earle* v. *Pennsylvania*, *ante*, 449, such an attachment cannot create any lien upon specific assets of the bank in the hands of the receiver, nor disturb his custody of those assets, nor prevent him from paying to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, all moneys coming to his hands, or realized by him as receiver from the sale of the property and assets of the bank.

THE case is stated in the opinion.

Mr. John G. Johnson and *Mr. Asa W. Waters* for plaintiff in error. *Mr. W. H. Addicks* was on *Mr. Waters'* brief.

Mr. James C. Stillwell for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case differs somewhat in its facts from those in *Earle* v. *Pennsylvania*, *ante*, 449. It appears that on February 24, 1898, the appellee Conway, in an action of assumpsit in the Court of Common Pleas of the county of Philadelphia, ob-

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tained a judgment against one John G. Schall for $1012.43. Upon that judgment a writ of attachment was issued and served May 24 and 25, 1898, upon the Chestnut Street National Bank of Philadelphia and upon Earle, receiver, as garnishees—the receiver having been appointed January 29, 1898—commanding them to show cause on a day named why the judgment against Schall, with costs of writ, should not be levied of his effects in their hands.

The bank and the receiver entered their appearance as defendants and garnishees "for the purpose only of moving said court to set aside the writ of summons in attachment sur-judgment against him and them, and to dismiss and vacate all proceedings in attachment therein against him or them." That motion was made upon the ground that the Court of Common Pleas was without jurisdiction under section 5242 of the Revised Statutes of the United States. The motion was denied, and the order of the Court of Common Pleas was affirmed by the Supreme Court of Pennsylvania.

We are of opinion that it was not error to deny the motion to set aside the service of the writ of attachment on the bank and the receiver. No sound reason can be given why the receiver of a national bank may not be notified by service upon him of an attachment issued from a state court of the nature and extent of the interest asserted or sought to be acquired by the plaintiff in the attachment in the assets in his custody. But for the reasons stated in *Earle* v. *Pennsylvania*, such an attachment cannot create any lien upon specific assets of the bank in the hands of the receiver, nor disturb his custody of those assets, nor prevent him from paying to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, all moneys coming to his hands or realized by him as receiver from the sale of the property and assets of the bank. After the service of the attachment upon the receiver it became his duty to report the facts to the Comptroller, and it then became the duty of the latter to hold any funds coming to his hands through the Treasurer of the United States as the proceeds of the sale of the bank's assets subject to any interest which the plaintiff may have legally acquired therein as against

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Syllabus.

his debtor under the attachment issued on the judgment in his favor in the state court.

As the judgment of the Supreme Court of Pennsylvania goes no further than to sustain the right of the plaintiff to have the attachment served upon the receiver as garnishee, it is

Affirmed.

MR. JUSTICE WHITE dissented.

MOTES *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 257. Submitted April 23, 1900. — Decided May 21, 1900.

By the Revised Statutes of the United States it is provided: "§ 5508. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States. § 5509. If in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offence is committed." Several persons were indicted under the above provisions in the Circuit Court of the United States for the Northern District of Alabama for the crime of murder committed in execution of a conspiracy to injure, oppress, threaten and intimidate one Thompson because of his having informed the United States authorities of violations by the conspirators of the laws of the United States relating to distilling. In Alabama murder in the first degree is punishable by death or imprisonment for life at the discretion of the jury. At the preliminary trial before a United States commissioner, Taylor, one of the accused, testified and his evidence was put in writing and signed by him. It was sufficient, if accepted, to estab-

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lish the guilt of all the defendants. The accused had opportunity to cross-examine him. At the final trial in the Circuit Court, Taylor, who had pleaded guilty, was called as a witness for the Government, but did not respond. He had disappeared, although seen in the corridor of the court-building about an hour before being called. His absence was not by the procurement or advice of the accused, but was due to the negligence of the officers of the Government. The court, over the objections of the accused, allowed Taylor's written statements made under oath at the examining trial to be read in evidence to the trial jury. The accused were found guilty as charged in the indictment and sentenced to the penitentiary for life. At the trial one of the accused testified and stated that he and Taylor committed the murder, and that the other defendants knew nothing of it and had nothing to do with it. *Held:*

(1) That no constitutional objection could be urged against sections 5508 and 5509;

(2) That under the act of January 15, 1897, c. 29, 29 Stat. 487, the Circuit Court could not have imposed the penalty of death for the offence charged, but only imprisonment for life;

(3) That under the Circuit Court of Appeals Act, 1891, any criminal case involving the construction or application of the Constitution of the United States, can be brought after final judgment directly to this court from the Circuit Court;

(4) That the admission as evidence of the written statements made by Taylor at the examining trial was in violation of the rights of the accused under the clause of the Sixth Amendment to the Constitution of the United States declaring that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witness against him;

(5) That the defendant who testified under oath as to his guilt, and whose testimony was sufficient to convict him, independently of Taylor's written statement at the examining trial was not entitled to a reversal for the error committed in allowing that statement to be read, because it could not have prejudiced him.

THE case is stated in the opinion of the court.

Mr. Lee Cowart for plaintiff in error.

Mr. Assistant Attorney General Boyd for the United States.

MR. JUSTICE HARLAN delivered the opinion of the court.

Columbus Winchester Motes, alias Chess Motes, Walter W. Motes, William Robert Taylor, Jasper Robinson, John Little-

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john and Mark Grant Blankenship were indicted in the Circuit Court of the United States for the Southern Division of the Northern District of Alabama under sections 5508 and 5509 of the Revised Statutes of the United States.

Those sections are as follows:

"5508. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

"§ 5509. If in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offence is committed."

The first count of the indictment charged in substance that on the 14th day of March, 1898, and within the jurisdiction of the court, the persons above named conspired to injure, oppress, threaten and intimidate one W. A. Thompson, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having exercised the same, in that he had about the 2d day of October, 1897, informed one Robert A. Moseley, United States commissioner for the Northern District of Alabama, that Bob Taylor, Chess Motes, Ben Morris, Jasper Robinson and Walter Motes had about the months of July, August, September, October, November and December, 1895, violated the internal revenue laws of the United States by unlawfully carrying on the business of distillers without having given bond, as required by law, and having in their possession and custody and under their control

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a still and distilling apparatus set up without having the same registered. It was also charged that in furtherance of the conspiracy so formed and to effect the object thereof the accused "did on, to wit, about the 14th of March, eighteen hundred and ninety-eight, go upon the highway and did then and there, in the county of Talladega, in the State of Alabama, in the southern division of the Northern District of Alabama, and within the jurisdiction of said court, unlawfully, wilfully, premeditatedly, deliberately and with malice aforethought kill and murder the said W. A. Thompson by shooting him with a gun or guns, because he, the said W. A. Thompson, had reported to the said Robert A. Moseley, United States Commissioner as aforesaid, said violation of the internal revenue laws of the United States by the said Bob Taylor, Chess Motes, Ben Morris, Jasper Robinson and Walter Motes, as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

The third count differed from the first one only in charging a conspiracy, formed by the same persons, to injure, oppress, threaten and intimidate Thompson because of his having, about March 8, 1898, informed a deputy collector of internal revenue that Mark Grant Blankenship had, about the above date, carried on the business of distiller in violation of law; also, that to effect the object of that conspiracy, and because of Thompson having given such information to the deputy collector of internal revenue, that the accused had unlawfully, wilfully, premeditately, deliberately and with malice aforethought, killed and murdered him.

There are seven counts in the indictment, but the first and third are sufficient to show the nature of the charges against the accused and to bring out the questions disposed of by this opinion.

It is recited in the bill of exceptions that Taylor pleaded guilty, but the transcript does not contain any entry of record showing such to be the fact.

The jury found the "defendants Walter W. Motes, Columbus W. Motes, Jasper Robinson, John Littlejohn and Mark Grant Blankenship guilty as charged in the indictment," and

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in their verdict asked "the mercy of the court for the four defendants, Walter W. Motes, Jasper Robinson, John Littlejohn, Mark Blankenship, and especially for John Littlejohn and Jasper Robinson."

Motions in arrest of judgment and for new trial were overruled, and judgment was entered upon the verdict, sentencing the defendants other than Taylor to imprisonment in the penitentiary for life.

We have seen that by section 5508 of the Revised Statutes it is made an offence against the United States for two or more persons to conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States—the punishment prescribed being a fine of not more than $5000, imprisonment not more than ten years and ineligibility to any office or place of honor, profit or trust created by the Constitution or laws of the United States. And by section 5509 it is provided that if in committing the above offence any other felony or misdemeanor be committed, the offender shall suffer such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offence is committed.

No question has been made—indeed none could successfully be made—as to the constitutionality of these statutory provisions. *Ex parte Yarborough*, 110 U. S. 651; *United States* v. *Waddell*, 112 U. S. 76. Referring to those provisions and to the clause of the Constitution giving Congress authority to pass all laws necessary and proper for carrying into execution the powers specifically granted to it, and all other powers vested in the Government of the United States, or in any department or officer thereof, this court has said: "In the exercise of this general power of legislation, Congress may use any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and the spirit of the Constitution." *Logan* v. *United States*, 144 U. S. 263, 283, and authorities there cited. It was the right and privilege of Thompson, in return for the protection he enjoyed under the Constitution and laws of the United States, to

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aid in the execution of the laws of his country by giving information to the proper authorities of violations of those laws. That right and privilege may properly be said to be secured by the Constitution and laws of the United States. And it was competent for Congress to declare a conspiracy to injure, oppress, threaten or intimidate a citizen because of the exercise by him of such right or privilege to be an offence against the United States.

The reference in the above sections to the laws of the State in which the offence was committed makes it necessary to ascertain from the laws of Alabama what punishment could be inflicted for the crime that was committed while the conspiracy referred to in section 5508 was being carried into execution.

By the Code of Alabama it is provided (c. 158): "§ 4854. Every homicide, perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery or burglary, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree; and every other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." "§ 4857. When the jury find the defendant guilty under an indictment for murder, they must ascertain, by their verdict, whether it is murder in the first or second degree; but if the defendant on arraignment confesses his guilt, the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of the testimony, and pass sentence accordingly. § 4858. Any person, who is guilty of murder in the first degree, must, on conviction, suffer death or imprisonment in the penitentiary for life, at the discretion of the jury; and any person who is guilty of murder in the second degree must, on conviction, be imprisoned in the

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penitentiary for not less than ten years, at the discretion of the jury." Alabama Code (1896), vol. 2, Criminal.

Taking these statutory provisions together, the question arises whether the court below had authority, in view of the verdict of the jury—"guilty as charged in the indictment"—to sentence the accused to imprisonment in the penitentiary for life. The contention of the accused is that it was for the jury to indicate by their verdict the punishment to be imposed by the court, and that the court was without power to act until the jury indicated the degree of the crime committed.

It is true that the crime charged against the accused was what is made by the laws of Alabama murder in the first degree, such offence being punishable with death or imprisonment in the penitentiary for life. And in that State it is the duty of the jury to ascertain by their verdict whether the offence charged was murder in the first or second degree. As therefore under the laws of Alabama, it was in the discretion of the jury, and not for the court, to say whether murder in the first degree should be punished by death or by imprisonment for life, and as the verdict of the jury did not indicate the mode of punishment, there would have been some difficulty in giving effect to that clause of section 5509 of the Revised Statutes of the United States, subjecting the accused to such punishment as is attached by the laws of the State in which the offence is committed, but for recent legislation by Congress.

The legislation to which we refer is found in sections one, two and three of the act of January 15, 1897, c. 29, which provides: "§ 1. That in all cases where the accused is found guilty of the crime of murder or of rape under sections 5339 or 5345, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life. § 2. That except offences mentioned in sections 5332, 1342, 1624, 5339 and 5345, Revised Statutes, when a person is convicted of any offence to which the punishment of death is now specifically affixed by the laws of the United States, he shall be sentenced to imprisonment at hard labor for life, and when any person is

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convicted of an offence to which the punishment of death, or a lesser punishment, in the discretion of the court, is affixed, the maximum punishment shall be imprisonment at hard labor for life. § 3. That the punishment of death prescribed for any offence specified by the statutes of the United States, except in sections 5332, 1342, 1624, 5339 and 5345, Revised Statutes, is hereby abolished, and all laws and parts of laws inconsistent with this act are hereby repealed." 29 Stat. 487.

It will be observed that by section 3 of this act (which is the latest statute on the subject) the death penalty is abolished in all cases of offences against the United States except those referred to in certain sections which do not embrace the present case. It was not therefore in the power of the court below to have sentenced the plaintiffs in error to suffer death for the crime of murder committed in the prosecution of the conspiracy which is made by section 5908 an offence against the United States. But we are to determine the scope of section 5509 in connection with the act of 1897. Under that act the punishment of death could not be inflicted except in the cases specified. So that section 5509 is to be enforced as if it declared that the offence therein prescribed should be punished in such mode as was consistent with the laws of Alabama, provided—such is the effect of the act of Congress of January 15, 1897—the accused should not for any offence covered by that section be subjected to the penalty of death. The provision in the Code of Alabama giving the jury discretion to affix the punishment of death or imprisonment for life in cases of murder in the first degree can have no application here, because the act of 1897 forbade the former mode of punishment in such a case as the present one. When, therefore, the jury found the defendants guilty as charged in the indictment, they found them guilty of what, under the laws of Alabama, was murder in the first degree, and they were sentenced by the Circuit Court of the United States to suffer imprisonment for life which those laws authorized in cases of that character. This was a substantial compliance with the provisions of sections 5508 and 5509 of the Revised Statutes.

It results that the Circuit Court imposed the only punishment

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authorized by the laws of the United States for the crime of which the defendants were found guilty.

To avoid misapprehension it should be said in this connection that the Circuit Court had no jurisdiction of this case simply as one of murder committed within the limits of the State, but only as one of conspiracy, under the act of Congress, accompanied by murder.

The Assistant Attorney General suggests as worthy of consideration whether, under this interpretation of the statutes, the present case can be brought here directly from the Circuit Court. This suggestion is based upon the provision in the act of January 20, 1897, c. 68, which withdraws from the consideration of this court, upon appeal or writ of error direct from the Circuit Court, cases of conviction of infamous crimes not capital, and gives jurisdiction in such cases, upon appeal or writ of error, only to the proper Circuit Court of Appeals; and it is assumed that no criminal case can, upon any ground, be brought here directly from a Circuit Court of the United States, unless it be a case of conviction of a capital crime. 29 Stat. 492. But such is not the law. Among other cases, this court, under the act of March 3, 1891, 26 Stat. 826, c. 517, establishing Circuit Courts of Appeals, can take cognizance of a criminal case, upon writ of error to review the judgment of a Circuit Court, when the case really "involves the construction or application of the Constitution of the United States." That act does not make a distinction between civil and criminal causes such as is implied by the above suggestion of the Government. At the present term of this court we have taken cognizance of a criminal case involving a misdemeanor, brought here directly from a Circuit Court of the United States. *Rider et al.* v. *United States*, *ante*, 251. And we had previously in *United States* v. *Rider*, 163 U. S. 132, 138, said: "By section six [of the Circuit Court of Appeals Act] the judgments or decrees of the Circuit Courts of Appeals were made final 'in all cases arising under the criminal laws,' and in certain other classes of cases, unless questions were certified to this court or the whole case ordered up by writ of certiorari as therein provided. *American Construction Co.* v. *Jacksonville Railway Co.*,

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158 U. S. 372, 380. Thus appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the Circuit Court of Appeals, and in all civil cases by appeal or writ of error without regard to the amount in controversy, except as to appeals or writs of error to or from the Circuit Courts of Appeals in cases not made final as specified in § 6." We further said in that case that the object of the act of March 3, 1891, c. 517, was to distribute between this court and the Circuit Courts of Appeals the entire appellate jurisdiction over the Circuit Courts of the United States.

The present case does involve the construction and application of the Constitution of the United States. It is necessary to determine whether the admission of certain testimony was not an infringement of rights secured to the accused by the Sixth Amendment of the Constitution, declaring that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."

It appears from the bill of exceptions that the Government offered to read to the jury the written statement of William Robert Taylor, taken in a preliminary examination before United States Commissioner Wilson of the case of the United States against Columbus W. Motes, William Robert Taylor, John Littlejohn and Dodge Blackenship. For the purpose of "laying a predicate" for offering that statement in evidence, Captain B. W. Bell was examined. He testified "that he was a special officer of the Department of Justice; that he had been engaged in working up the cases against these defendants and preparing them for trial; that in August, 1898, he caused the arrest of said William Robert Taylor and also Columbus W. Motes, John Littlejohn and Dodge Blankenship, on a charge of conspiracy and murder of W. A Thompson, and that on the 19th day of August, 1898, during and on the second day of their preliminary trial, one of the defendants, William Robert Taylor, voluntarily became a witness for the prosecution, and made a statement implicating in said murder Columbus W. Motes, John Littlejohn and Dodge Blankenship, who were at that time having their preliminary hearing before said commissioner, and also implicating in said murder Walter W. Motes and Jasper Rob-

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inson, who had been brought to said preliminary trial as witnesses for the Government, and that on the second day of said preliminary trial he (Bell) caused the arrest of the said Walter W. Motes and Jasper Robinson; that Taylor and the other three defendants on trial with him were held for trial by the commissioner and committed to jail without bail to await trial, and that since that time the said Taylor has been confined in the Jefferson County, Alabama, jail under commitment issued by said commissioner; that after the beginning of the present trial on the 20th of September, 1898, he went to the jail, took said Taylor into his custody more than two days before said Taylor escaped, and that said Taylor had not been in jail since, but that he had placed him in charge of one Ed. May, a witness for the Government in this case, and instructed May to let Taylor stay at the hotel at night with his family, and that in pursuance of said instruction Taylor remained at the hotel Tuesday night and Wednesday night before he absconded on Thursday; that he saw Taylor in the corridors of the court room about 10 o'clock A. M. Thursday, before he was called as a witness, about 11 o'clock the same day, and that when Taylor failed to respond he made a search for him in the city of Birmingham, and telegraphed to several places, and could not find him or learn anything at all as to his whereabouts." Bell further testified that on the preliminary trial before H. A. Wilson, United States commissioner, "Walter W. Motes and Jasper Robinson were arrested during the trial of the other defendants, Columbus W. Motes, John Littlejohn and Dodge Blankenship, said Taylor having implicated them in his testimony upon said trial. The defendants were all represented upon said preliminary trial by Mr. Lee Cowart. Mr. Cowart cross-examined the witness, as shown in the testimony; that all of the defendants, including the said Walter W. Motes and Jasper Robinson, had an opportunity to cross-examine the said witness Taylor, and he, in fact, was cross-examined by Mr. Cowart, acting either as attorney for Columbus W. Motes, John Littlejohn and Dodge Blankenship, or for all the defendants; that said cross-examination was reduced to writing; that he (said Bell) had never made or offered the said Taylor any inducements, promises, reward or

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hope, to induce him to make said statement; that before said Taylor was examined as a witness on the said preliminary trial he was taken to the office of the United States attorney, who cautioned him to make no statement unless it was purely voluntary, and told him emphatically that he could make no promise and offer him no hope whatever, and that said Taylor stated that he made the statement voluntarily and to relieve his own mind."

The United States marshal testified on behalf of United States that he had instructed his deputies that Taylor had escaped; that he had offered a reward of two hundred dollars for his arrest; that he had made diligent search in the city of Birmingham for Taylor, and could not learn anything as to his whereabouts. The chief of police of the city of Birmingham testified that he had not been officially notified that Taylor had escaped, but that he had seen something concerning it in the newspapers, and that he had made no special effort to arrest him and had no information as to his whereabouts. The United States then offered as a witness a deputy sheriff, who testified that the sheriff of Jefferson County and his deputies had been on the lookout for Taylor ever since his absence was known; that they had had photographs taken of him and sent them to various places, and that the deputies had been on the lookout for him all over Birmingham and other parts of Jefferson County, and that they had been unable to find him anywhere.

The Government introduced as a witness H. A. Wilson, who testified as follows: "I am a United States commissioner and held the preliminary trial in the case against these defendants on the 18th and 19th days of August, 1898. The defendants Columbus W. Motes, William Robert Taylor, John Littlejohn and Dodge Blankenship were brought before me upon a warrant issued on affidavit before United States Commissioner R. A. Moseley, Jr., by special officer Bell. Jasper Robinson and Walter W. Motes were present in court while the case was being heard. William Robert Taylor, one of the defendants, during the trial proposed to make a statement in the nature of a confession. I cautioned him, and told him that he could not be made to testify unless he chose to do so, and asked him if

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any inducement or promise had been made or offered to him. He said there had not; that the statement was voluntary, and he made it to relieve his mind. Walter W. Motes and Jasper Robinson were present in court as defendants at the time, as well as the other defendants who were on trial. I swore William Robert Taylor as a witness, administering to him the usual oath. He was then examined, and his testimony was committed to writing. I identify this statement (referring to the evidence of Taylor here handed to the witness) as the evidence taken before me. In his testimony, as is shown and as was the fact, he implicated the defendants Jasper Robinson and Walter W. Motes, who were arrested then and there. The defendants Columbus W. Motes, Blankenship and Littlejohn were represented by Mr. Cowart, and so were the defendants Walter W. Motes and Jasper Robinson as soon as they were arrested, and the trial of the four defendants then on trial, to wit, Columbus W. Motes, William Robert Taylor, John Littlejohn and Dodge Blankenship, was proceeded with and concluded in the presence of the defendants Jasper Robinson and Walter W. Motes. Mr. Cowart, as a matter of fact, did cross-examine the witnesses, as is shown by this testimony and as I recollect it, and all of the defendants, including Walter W. Motes and Jasper Robinson, were allowed by me an opportunity to cross-examine, although no separate trial was had, and all of these were examined without bail."

The testimony or statement given by Taylor at the preliminary trial of part of the defendants was then read in evidence by the Government, the accused objecting on the ground that a sufficient predicate had not been made for its introduction; but the objection was overruled and an exception taken. The defendants Walter W. Motes and Jasper Robinson severally objected to the reading of Taylor's statement against them on the ground that they were not on preliminary trial at the time the testimony was taken, were not parties to the case then being tried, and had not legally been called upon to cross-examine the witness. Those objections were also overruled, and an exception was taken.

Taylor's statement was lengthy, and showed a cross-examina-

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tion or an opportunity for the cross-examination of Taylor by the present defendants. It was quite sufficient, if accepted by the jury as true, to establish the guilt of some if not of all the accused. It is important to observe that at the time Taylor's statement was offered in evidence there had been no proof whatever of the conspiracy charged. Conspiracy was the basis of the prosecution; for in the absence of a conspiracy, in the carrying out of which the alleged murder was committed, the prosecution must have failed; the crime of murder, apart from the conspiracy to deprive a citizen of a right or privilege secured by the Constitution and laws of the United States, being punishable only by the State.

We are of opinion that the admission in evidence of Taylor's statement or deposition taken at the examining trial was in violation of the constitutional right of the defendants to be confronted with the witnesses against them. It did not appear that Taylor was absent from the trial by the suggestion, procurement or act of the accused. On the contrary, his absence was manifestly due to the negligence of the officers of the Government. Taylor was a witness for the prosecution. He had been committed to jail without bail. We have seen that the official agent of the United States in violation of law took him from jail after the trial of this case commenced, and, strangely enough, placed him in charge not of an officer but of another witness for the Government with instructions to the latter to allow him to stay at a hotel at night with his family. And on the very day when Taylor was called as a witness, and within an hour of being called, he was in the corridor of the court house. When called to testify he did not appear.

In *Reynolds* v. *United States*, 98 U. S. 145, 158, 159, which was an indictment for bigamy committed in Utah—the prosecution being under section 5352 of the Revised Statutes of the United States—the trial court admitted proof of what a witness had stated on a former trial of the accused for the same offence but under a different indictment. This court said: "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot

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complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated." In that case reference was made to several authorities, American and English, and the court further said: "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony."

In his Treatise on Constitutional Limitations, Cooley, after observing that the testimony for the people in criminal cases can only, as a general rule, be given by witnesses in court, at the trial, says: "If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party." Cooley's Const. Lim. (2d ed.) *318.

In *Regina* v. *Scaife*, 2 Den. Cr. C. 281; 285, 286; *S. C.* 17 Q. B. 238; 5 Cox Cr. C. 243, which was an indictment against three persons for a felony, it appeared that a witness had been kept out of the way by the procurement of one of the accused, and the question was whether the prosecution could use the deposition of the absent witness taken before magistrates in the mode directed by 11 & 12 Vict. c. 42, § 17. It was held by all the judges that the deposition was not admissible against a defendant who had not caused the absence of the witness. Lord Campbell, C. J., said: "I am of opinion that the rule for a new trial must be made absolute. Evidence having been given that the defendant Smith had resorted to a contrivance to keep the

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witness out of the way, the deposition was admissible against him; but it was not admissible against the other defendants, there being no evidence to connect them with the contrivance. The learned judge, Cresswell, J., in his summing up to the jury, seems to have made no distinction as to the duty of the jury to consider the deposition of the absent witness as evidence against the defendant Smith alone, and not as against the others. The question then is, whether such a deposition is admissible against a prisoner without proof that the deponent has been kept away by his contrivance or without proof of the death of the witness. No case has yet gone so far; and I should be afraid to lay down a rule which would deprive a prisoner of the advantage of having a witness for the prosecution against him examined and cross-examined before the jury, upon every matter that may be material to his defence. I, therefore, think that the deposition was improperly admitted against Scaife and Rooke, and that there should be a new trial." Patteson, J.—"The deposition of the absent witness, Sarah Ann Garnett, was admissible as against the defendant Smith, by whose contrivance she was kept out of the way, but it ought to have been applied to the case against him only, and not to the case against the other prisoners. No such distinction appears to have been made at the trial, but the evidence was allowed to go to the jury generally against all the prisoners, it being assumed, without any evidence whatever to support the assumption, that they all were connected with the contrivance to keep the witness out of the way." Coleridge, J.—"Before the enactment of 11 & 12 Vict. c. 42, I always understood the law was, that if a witness were absent, either by reason of the death of the witness, or by the procurement of the prisoner, the deposition was receivable in evidence against him. But I believe these were the only two cases where the absence of a witness let in his depositions. Absences from every other cause were within the same category, and did not render them admissible. The seventeenth section of the recent statute took another case—where a witness was proved to be so ill as to be unable to travel—out of one category and put it into another."

In the present case there was not the slightest ground in the

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evidence to suppose that Taylor had absented himself from the trial at the instance, by the procurement or with the assent of either of the accused. Nor (if that were material) did his disappearance occur so long prior to his being called as a witness as to justify the conclusion that he had gone out of the State and was permanently beyond the jurisdiction of the court. His absence, as already said, was plainly to be attributed to the negligence of the prosecution. The case is not within any of the recognized exceptions to the general rule prescribed in the Constitution.

It is suggested that the action of the Circuit Court was in harmony with the decisions of the Supreme Court of Alabama. *Lowe* v. *State*, 86 Ala. 47; *Pruitt* v. *State*, 92 Ala. 41. We have examined the cases in that court to which attention has been called, and do not think they sustain the ruling of the court below under the circumstances disclosed by this record. But the question cannot be made to depend upon the rules of criminal evidence prevailing in the courts of the State in which the crime was committed. It must be determined with reference to the rights of the accused as secured by the Constitution of the United States. That instrument must control the action of the courts of the United States in all criminal prosecutions before them. We are unwilling to hold it to be consistent with the constitutional requirement that an accused shall be confronted with the witnesses against him, to permit the deposition or statement of an absent witness (taken at an examining trial) to be read at the final trial when it does not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but does appear that his absence was due to the negligence of the prosecution. We need not decide more in the present case.

For the error referred to the judgment of the Circuit Court must be reversed as to all the plaintiffs in error and a new trial awarded, except as to Columbus W. Motes. The case as to him rests upon peculiar grounds, because of his testimony on behalf of the accused at the final trial. He testified: "My name is Columbus W. Motes; I am about thirty years old. I know the defendants who are on trial for the murder of W. A.

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Thompson; I knew Thompson, and know when and where he was killed; I also know who killed him. He was killed on March 14th last, near his home, by myself and William Robert Taylor. No other person had anything whatever to do with it. I went to Taylor's house on March 13th, 1898, just after he had returned from Birmingham, where he had been attending the United States court as defendant. We were both under indictment in the United States court at Birmingham for illicit distilling. Taylor attended court and I did not. W. A. Thompson was a witness against both of us, but I did not know who reported us. Taylor told me on the 13th of March, the day he got home from the United States court at Birmingham, that he got our cases continued on March 12th, 1898, until the next term of the court. We then and there agreed to kill Thompson to keep him from appearing as a witness against us at the next term of the court. We agreed to kill him on the next day as he came from Sylacauga, so the neighbors would think he was killed by Dodge Blankenship and Ad Smith, who only a few days before that time had been arrested and bound over for illicit distilling. We took my gun, a rifle, and went to the place where we knew Thompson would pass and waited until he came along. Taylor shot him three times with the rifle. I was watching, according to the agreement between us, to see if any person saw us. The third shot is the one that killed him. The bullet entered his forehead. After we killed him, which was about the middle of the evening, we got his money out of his pockets, eighteen dollars, all in two-dollar bills, and the next morning we hid it in a tree near Taylor's house. Neither John Littlejohn, Dodge Blankenship, Walter Motes or Jasper knew anything about our plans to kill Thompson, were not present when he was killed, and had nothing whatever to do with the murder."

In this evidence the jury had conclusive proof of the guilt of Columbus W. Motes of the crime charged in the indictment. The admission of the statement of Taylor in evidence was, therefore, of no consequence as to him; for in his own testimony enough was stated to require a verdict of guilty as to him, even if the jury had disregarded Taylor's statements

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altogether. We can therefore say, upon the record before us, that the evidence furnished by Taylor's statement was not so materially to the prejudice of Columbus W. Motes as to justify a reversal of the judgment as to him. It would be trifling with the administration of the criminal law to award him a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him.

It is proper to say that there are other questions of a serious character raised by the assignment of errors. But as those questions may not arise upon another trial, we do not now consider them.

The judgment as to Columbus Winchester Motes is affirmed, but the judgment as to all the other plaintiffs in error is reversed, with directions to grant a new trial and for further proceedings consistent with this opinion.

HAWLEY *v.* DILLER.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 116. Submitted February 2, 1900.—Decided May 28, 1900.

An applicant for public land under the act of Congress of June 3, 1878, 29 Stat. 89, c. 151, known as the Timber and Stone Act, must support his application by an affidavit stating that "he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or receiver of the land office within the district where the land is situated." The same act provides: "If any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and

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Counsel for Appellant.

all right and title to the same; and any grant or conveyance which he may have made, *except in the hands of bona fide purchasers*, shall be null and void."

An entryman under this act acquires only an equity, and a purchaser from him cannot be regarded as a bona fide purchaser within the meaning of the act of Congress unless he become such after the Government, by issuing a patent, has parted with the legal title.

A construction of the above act long recognized and acted upon by the Interior Department should not be overthrown unless a different one is plainly required by the words of the act.

The result of the decisions of this court in relation to the jurisdiction of the Land Department when dealing with the public lands is as follows: (1) That the Land Department of the Government has the power and authority to cancel and annul an entry of public land when its officers are convinced, upon a proper showing, that the same was fraudulently made; (2) that an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and applied for the same, and in all respects complied with the requirements of the law; (3) that the Land Department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee; and (4) that redress can always be had in the courts where the officers of the Land Department have withheld from a preëmptioner his rights, where they have misconstrued the law, or where any fraud or deception has been practiced which affected their judgment and decision.

The principle reaffirmed that where the matters determined by the Land Office "are not properly before the Department, or its conclusions have been reached from a misconstruction by its officers of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected."

Sections 2450 to 2457 inclusive of the Revised Statutes, relating to suspended entries of public lands and to suspended land claims, and which sections require certain matters to be passed upon by a Board consisting of the Secretary of the Interior and the Attorney General, construed and held to apply only to decisions of the Land Office sustaining irregular entries, and not to decisions rejecting and cancelling such entries under the general authority conferred upon the Land Department in respect to the public lands.

THE case is stated in the opinion of the court.

Mr. Charles K. Jenner for appellants. *Mr. A. B. Browne* was with him.

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No brief filed for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case involves a claim to a tract of land arising out of an entry made under the act of Congress of June 3, 1878, c. 151, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada and in Washington Territory," known as the Timber and Stone Act. 20 Stat. 89.

The act in its first section provided for the sale at a named price and in quantities not exceeding one hundred and sixty acres to any person or association of persons of surveyed public lands in the States and Territory named, not included within the military, Indian and other reservations, and which were "valuable chiefly for timber, but unfit for cultivation." It also provided for the sale of lands "valuable chiefly for stone" on the same terms as timber lands.

By the second section of the act it was provided: "§ 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonging to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the

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register or receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, *except in the hands of bona fide purchasers*, shall be null and void."

The third section, after making provision for the publication of the application to purchase, provides: "And upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May 10, 1872, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

The bill of complaint presents substantially the following case under the above legislation:

On the 30th day of April, 1883, after having complied with the requirements of the above act, one Henry C. Hackley paid to the receiver of the land office in Olympia, Washington Territory, the purchase price of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 13, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 12, all in township 36 north, of range 3 east, Willamette meridian, in the county of Skagit, Territory (now State) of Washington—taking from the receiver what is known as the final or duplicate receipt. On the same day Hackley conveyed the tract described to Stephen S. Bailey by a sufficient deed of warranty; and on December 29, 1887, Bailey sold, transferred and conveyed the land to the appellants.

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On August 9, 1888, the Commissioner of the General Land Office suspended and held for cancellation the entry made by Hackley, it having been reported to that office by a special agent that the land in question was not chiefly valuable for timber, but was valuable agricultural land, and also that the entry by Hackley was made in the interest of Bailey.

On or about August 23, 1888, the register and receiver of the local land office at Seattle caused notice of the action of the Commissioner of the General Land Office to be served upon the transferees, the notice stating in detail the fact of the entry by Hackley, and that the special agent had reported that he had made a personal examination of the land and found that it was not chiefly valuable for timber, but was valuable agricultural land, and that the entry thereof was made in the interest of Bailey and others, and not for the benefit and use of the entryman.

Within sixty days after the above notice, the transferees made a special appearance by attorneys, and moved that the proceeding be dismissed and the entry reinstated and passed to patent, upon the ground that the action of the Commissioner was in excess of any authority possessed by him or by the Land Department. That motion was denied by the Commissioner. The bill alleges that such denial was not the result of the consideration of any fact or facts, but of an erroneous opinion of the law.

Thereupon the transferees applied for a hearing in accordance with the notice given, and they stipulated with the attorney for the Government that the case be consolidated with eleven other entries owned by them and which were suspended at or about the same time by the Commissioner.

That application was granted, and a hearing was had before the local land office.

The register and receiver being divided in opinion the matter went to the Commissioner, who decided that all the land embraced in the entries before him, including the land here in question entered by Hackley, was timber land that could be entered as such under the act of June 3, 1878; that all of the proceedings in relation to Hackley's entry were regular; that

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the proof submitted on the entry was sufficient; and that the Government had failed to prove that that entry was made in the interest of Bailey or of any other person than the entryman. It was therefore ordered by that officer that the entry in question be removed from suspension and remain intact upon the records of the Land Department, and that the patent of the United States issue therefor.

Subsequently, January 31, 1891, no patent having been issued, Secretary Noble ordered the Commissioner of the General Land Office to certify and transmit all the papers and testimony in the cause to his office. "Said order," the bill alleged, "was made by the said Secretary of the Interior without any appeal being taken by the United States, and without notice to said transferees, or any of the defendants in said cause." The order was complied with, but the papers remaining in the hands of Secretary Noble without any decision being made by him while in office. The case was taken up by his successor, Secretary Smith, and was decided October 19, 1893, adversely to the transferees. *United States* v. *Bailey*, 17 L. D. 468. The bill further alleged: "Said decision of the Commissioner of the General Land Office, rendered in said cause as aforesaid, was at no time considered by the honorable Secretary of the Interior and the Attorney General of the United States, acting as a board or otherwise, nor was the testimony and proceedings in said cause by them considered or acted upon, as a board, at all; nor did the Attorney General of the United States at any time consider or act upon said decision of the Commissioner of the General Land Office, or the pretended testimony, or the papers and documents in relation to said entry, at all, either as a member of a board or in his individual capacity."

Throughout all these proceedings appellants protested that the Land Office was without jurisdiction or authority to cancel the entries of the lands that had been transferred to them.

In the course of his opinion Secretary Smith said that there was no charge nor was there any testimony affecting the transaction between Bailey and his transferees. He also said that his interpretation of the statute did not imply that a timberland entryman was not authorized to sell his entry at any time

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that he chose after he had made his proof and received his certificate. 17 L. D. 468, 471, 476.

In accordance with the directions of the Secretary, the Commissioner of the General Land Office, on November 21, 1893, ordered the cancellation of the timber-land entry of Hackley upon the records of the Land Department, and the land was held subject to entry as public land of the United States.

Thereafter Diller, the present appellee, made entry of and purchased the land in question under the above act of June 3, 1878, and a patent therefor from the United States, bearing date October 15, 1895, was issued to him.

On February 21, 1896, the plaintiffs, now appellants and the transferees of Bailey, brought this suit against Diller in the Circuit Court of the United States for the District of Washington, Northern Division. The bill, after setting forth the above and other facts, alleged that the action of the Land Department in regard to the entry in question was without authority of law and that the patent to Diller was wrongfully issued.

The relief asked was a decree holding the patent of the defendant to be a cloud upon the title of the plaintiffs, adjudging that the defendant held the title in trust for them, and requiring him to convey to them whatever title he might have obtained or acquired by virtue of such patent; that the title of the plaintiffs to the land be forever quieted against the defendant; and that such further relief be granted in the premises as might be equitable.

A demurrer to the bill having been overruled, the defendant filed both a plea and an answer. After referring to the hearing before the receiver and the register, resulting in a division of opinion between those officers, the plea recited as a defence the history of the proceedings as above stated, and the entry of the land and the issue of a patent to the defendant after the cancellation of Hackley's entry. The plea was overruled. In his answer the defendant questioned the good faith and sufficiency of the conveyances from Hackley to Bailey and from Bailey to the plaintiffs. A replication was filed by the plaintiffs in which they asserted the truth and sufficiency in law of their bill, and

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made a countercharge of insufficiency, untruthfulness and uncertainty as to the defendant's answer.

Upon final hearing in the Circuit Court Judge Hanford held that where land had been regularly entered under the act of June 3, 1878, it was not subject to forfeiture after it had been conveyed to a *bona fide* purchaser; that the opinion of the Secretary of the Interior showed that the original entry in question was cancelled solely because it was deemed fraudulent, and no consideration whatever was given to the rights of the plaintiffs as *bona fide* purchasers; and that the evidence clearly showed that the plaintiffs were *bona fide* purchasers within the meaning of the act of Congress referred to. The Circuit Court was also of opinion that "the case in the Land Department, after the entry had been suspended, should have been adjudicated by the board composed of the Attorney General, the Secretary of the Interior and the Commissioner of the General Land Office, as provided by sections 2450 and 2451, Revised Statutes, and the Secretary of the Interior, without a determination of the board, could not lawfully cancel the entry." A decree was therefore entered adjudging the plaintiffs to be the equitable owners in fee and entitled to the lands described in the bill; that the patent issued to the defendant Diller for the land in question was issued improvidently and without authority of law, was a cloud upon the title of the plaintiffs, and should be removed; and that whatever title might have accrued under or through such patent was held by the defendant in trust for the use and benefit of the plaintiffs. It was further adjudged that the defendant should convey to the plaintiffs, by good and sufficient deed, whatever of title he might have acquired under and by virtue of the patent, free and clear of any and all incumbrance, within ten days from the filing of the decree, and the master was authorized to make the conveyance in the event of his failure or refusal so to do; and the title of the plaintiffs to the land was declared to be forever quieted as against the defendant. *Hawley* v. *Diller*, 75 Fed. Rep. 946.

The defendant appealed and the decree of the Circuit Court was reversed with directions to dismiss the bill with costs to the defendant—Judge Hawley delivering the opinion of the

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Circuit Court of Appeals. *Diller* v. *Hawley*, 48 U. S. App. 462. From that decree the plaintiffs have appealed to this court.

As shown by the above statement of the provisions of the act of June 3, 1878, 20 Stat. 89, c. 151, known as the Timber and Stone Act, a purchaser of the surveyed public lands in California, Nevada, Oregon and Washington, valuable chiefly for timber but unfit for cultivation, or valuable chiefly for stone, was required in his sworn application to state that he did not seek to purchase the same on speculation but in good faith to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made any agreement or contract with any person or persons by which the title he might acquire from the United States should inure in whole or in part to the benefit of any person except himself; and if the applicant swore falsely in the premises, he became liable to the penalties of perjury, and would forfeit the money he paid for the lands; and all right and title to the same and any grant or conveyance he may have made, "except in the hands of *bona fide* purchasers," would be null and void.

Who, within the meaning of the act, are to be deemed *bona fide* purchasers? Could the appellants, against whom, in respect of these lands, no charge of fraud was made, be deemed *bona fide* purchasers, if it appeared to the Land Department, before a patent issued, that the original entryman made the application to purchase "on speculation" and not in good faith to appropriate the lands to his own exclusive use and benefit?

The words "*bona fide* purchasers," as applied to purchasers of public lands, did not appear for the first time in the Timber and Stone Act of 1878. The first section of the act of June 22, 1838, granting preëmption rights to settlers on the public lands, contains substantially the same provisions as to the effect of a false oath by the applicant and the same saving for the benefit of *bona fide* purchasers. 5 Stat. 251, c. 99. Like provisions were made in the act of September 4, 1841, appropriating the proceeds of the sales of the public lands and granting preëmption rights. 5 Stat. 453, 456, c. 16, § 13. And the provisions of the last act were preserved in section 2262 of the Revised Statutes.

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The contention of appellants is that as between themselves and the United States they must be deemed to have been *bona fide* purchasers from the moment they bought in good faith from Bailey, the vendee of Hackley, (although no patent had been issued,) and that, under the act, they could not be affected by the fraud of the original entryman or his assignee.

While the mere words of the act of Congress furnish some ground for this contention, the interpretation suggested cannot be approved. In *Root* v. *Shields*, 1 Wool. 340, 348, 363, Mr. Justice Miller had occasion to consider who were to be regarded as *bona fide* purchasers under the preëmption laws when no patent had been issued by the United States. He said: "It is further insisted on behalf of the defendants that they are *bona fide* purchasers, and that they, as such, are entitled to the protection of the court. I think it pretty clear that some at least of these defendants purchased and paid their money without any knowledge in fact of any defect in the title. Yet they are not *bona fide* purchasers, for a valuable consideration, without notice, in the sense in which the terms are employed in courts of equity. And this for several reasons. They all purchased before the issue of the patent. The more meritorious purchased after the entry had been assailed and decided against by the land office. But that is a circumstance not material to this consideration. Until the issue of the patent the legal title remained in the United States. Had his entry been valid, Shields would have taken only an equity. His grantees took only an equity. They did not acquire the legal title. And in order to establish in himself the character of a *bona fide* purchaser, so as to be entitled to the protection of chancery, a party must show that, in his purchase and by the conveyance to him, he acquired the legal title. If he have but an equity, it is overreached by the better equity of his adversary."

The rule thus laid down was followed by Secretary Teller in *Cogswell's Case*, 3 L. D. 23, 28. In *Chrisinger's Case*, 4 L. D. 347, 349, Secretary Lamar said: "It is insisted by counsel, and ably argued at length, that the assignees of Chrisinger, being *bona fide* purchasers after entry, are entitled to intervene and have their interests protected as they took without notice of

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any defect in the final proof. This proposition is not tenable. It involves the principle that although the claim for title while in the hands of the entryman is worthless, on account of his failure to comply with the law, such claim may be strengthened and made a matter of absolute right by virtue of a transfer to an innocent purchaser. The converse of this, however, is true. Conceding the right of sale after the issuance of final certificate and prior to patent, the purchaser takes no better claim for title than the entryman has to confer, and whatever right is thus acquired is subject to the subsequent action of the Land Department. *Myers* v. *Croft*, 13 Wall. 291; *Margaret Kissack*, 2 C. L. L. 421. Again, the Department must deal directly with its own vendees, with the persons with whom it contracts. It cannot undertake to follow the transfers of the grantees, and to settle questions that may arise upon such transfers, but must leave such matter for determination in the courts."

So in *Smith* v. *Custer*, 8 L. D. 269, 278, Secretary Vilas said: "The preëmption purchaser takes by his final proofs and payment, and his certificate of purchase, only a right to a patent for the public lands in case the facts shall be found by the General Land Office and the Interior Department upon appeal to warrant the issuance of it. Whatever claim to patent he possesses by virtue of his payment and certificate is dependent upon the action of the Department and its future finding of the existence of the conditions, and his compliance in fact with the prerequisites, prescribed by law to the rightful acquisition of the public land he claims. This being so, it is plain that the purchaser can acquire from the entryman no greater estate or right than the entryman possesses. The purchaser is chargeable with knowledge of the law, which includes knowledge of this law; and is chargeable with knowledge of the state of the title which he buys, in so far, at least, as that the legal title remains in the United States, subject to the necessary inquiry and determination by the land office and Department upon which a patent may issue. He is not then an 'innocent purchaser,' so far as there may exist reasons why that patent should not issue. He buys subject to the risk of the consequences of the inquiry depending in the Department. He buys a title *sub judice*. At

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the most, it is but an equitable title, the legal title being in the Government. It is a familiar rule that the purchaser of an equitable title takes and holds it subject to all equities upon it in the hands of the vendor, and has no better standing than he. *Boone* v. *Chiles*, 10 Pet. 177; *Root* v. *Shields*, 1 Woolworth, 340."

These principles were applied by the Land Department in *Travelers' Insurance Co.*, 9 L. D. 316, 320, 321.

Again, in *United States* v. *Allard*, 14 L. D. 392, 405, 406, the question was fully examined by Secretary Noble in the light of the authorities, and his conclusion was thus stated: "A *bona fide* purchaser of land is one who is the purchaser of the legal title, or estate; and a purchaser of a mere equity is not embraced in the definition. *Boone* v. *Chiles*, 10 Pet. 177; 3 Op. Attys. Gen. 664. This was the well-defined meaning of the term long before the enactment of the statute under consideration, and, under a well-established rule of construction, unless it is apparent that Congress intended it to have a different meaning, it is to be presumed to have been used in its technical sense. There is nothing in the present statute to indicate that Congress used the term in other than its technical sense. Indeed, it may properly be considered as having attained a technical meaning as used by Congress in previous legislation relating to the disposal of the public lands. As long ago as 1841, Attorney General Legare, (3 Op. Attys. Gen. *supra*,) in considering a case which arose under the preëmption act of 1838, 1 Lester, 49, involving the use of the term in that act, and the right of an assignee of a preëmption claimant thereunder, held: 'The assignee took only an equity, and he took it, of course, subject to all prior equities. The patent, it is needless to say, is the only complete legal title under our land laws. But to protect a purchaser under the plea of a purchase for a valuable consideration, without notice, he must have a complete legal title.'" After referring to *Root* v. *Shields*, above cited, the Secretary concluded: "It thus appears that prior to the passage of the act under consideration (June 3, 1878) it had been determined, both by executive construction and judicial interpretation, that the term '*bona fide* purchaser,' as used in the preëmption law, was so used in its technical sense, or with reference to its pre-

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viously known and well-defined legal import. It is therefore to be presumed, nothing appearing to the contrary, that Congress, in making use of the term in the Timber and Stone Act, did so in the light of such construction, and must have intended its use in the same sense as in the preëmption law, namely, that to be a *bona fide* purchaser within the protection of the statute, a party must have acquired by his purchase and the conveyance to him a complete legal title." See also *Whitaker* v. *So. Pac. R. R. Co.*, 2 Copp's Public Lands (1882 ed.), 919, 923; *Stout* v. *Hyatt*, 13 Kansas, 232, 243, 244; *Taylor* v. *Weston*, 77 California, 534, 540.

We are of opinion that the rule announced in *Root* v. *Shields*, above cited, and which has been steadily followed in the Land Department, is consistent with the words of the statute. If any doubt existed on the subject, the construction so long recognized by the Interior Department in its administration of the public lands should be not overthrown, unless a different one is plainly required—as it is not—by the words of the act. *United States* v. *Philbrick*, 120 U. S. 52, 59; *United States* v. *Johnston*, 124 U. S. 236, 253; *United States* v. *Alabama Great Southern R. R. Co.*, 142 U. S. 615, 621.

The contention of appellants that they could not be affected by the fraud, if any, committed by the original entryman or his vendee being unsound, is there any other ground upon which the court can hold that the title to these lands is held by the appellee in trust for them?

It is contended that the Land Department was without jurisdiction to cancel the original entry. The exclusion of mere speculators from purchasing the public lands referred to in the Timber and Stone Act would be of no practical value if it were true that one having purchased in good faith from an entryman who is proved to have sworn falsely in his application, could demand, of right, that a patent be issued to him. The Land Department has authority, at any time before a patent is issued, to inquire whether the original entry was in conformity with the act of Congress. *Knight* v. *United States Land Association*, 142 U. S. 161, and *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 593, and authorities cited in each case. Of course, that

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Department could not arbitrarily destroy the equitable title acquired by the entryman and held by him or his assignee. Those who hold such title have a right to be notified of and heard in any proceeding instituted in the Land Department having for its object the cancellation of the entry upon which the equitable title depends. In the present case the appellants had full notice of the proceedings before the register and receiver and before the Commissioner of the General Land Office, which resulted in the cancellation of the original entry. And we infer from the record that they had notice of the order of the Secretary of the Interior directing the papers to be sent to him for examination. The plea, referring to the action of the Commissioner of the General Land Office and of the Secretary of the Interior, distinctly stated that Hackley "was given every opportunity to be heard before the said officers of the Land Department of the United States, likewise his said transferees, before said certificate was canceled." The allegation in the bill on this point means only that the order of the Secretary of the Interior to send the papers to him was made without notice to Hackley and his transferees. But that is immaterial if they had an opportunity to be heard before the Secretary while the case was in his hands. In the summary of the points relied upon by appellants, it is not claimed that they had no such opportunity. The order of cancellation by the Secretary was based upon the fact, which he ascertained from the evidence, that the original entry of the land in dispute was not in good faith for the exclusive benefit and use of the entryman but for the speculative purposes of others with whom the entryman was in collusion.

It is suggested that the order of the Land Department cancelling the entry was based upon a misconstruction of the law. If it had been, then the error committed could be corrected by the courts; for, as said in *Sanford* v. *Sanford*, 139 U. S. 642, 647, where the matters determined by the Land Office "are not properly before the Department, or its conclusions have been reached from a misconstruction by its officers of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been con-

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ceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected." See also *Quinby* v. *Conlan*, 104 U. S. 420, 426; *Baldwin* v. *Stark*, 107 U. S. 463, 465; *Cornelius* v. *Kessel*, 128 U. S. 456, 461. But there was no misconstruction of the law by the Land Department. Upon the facts found, no other conclusion could properly be reached than the one indicated by the opinion of the Secretary of the Interior, *United States* v. *Bailey*, 17 L. D. 468, namely, that the original entry of the land was in violation of the act of Congress.

We are of opinion that the result of the decisions of this court was correctly stated by Judge Hawley, when speaking for the United States Circuit Court of Appeals, in *American Mortgage Co.* v. *Hopper*, 29 U. S. App. 12, 17, he said: "(1) That the Land Department of the Government has the power and authority to cancel and annul an entry of public land when its officers are convinced, upon a proper showing, that the same was fraudulently made; (2) that an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and applied for the same, and in all respects complied with the requirements of the law; (3) that the Land Department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee; and (4) that redress can always be had in the courts where the officers of the Land Department have withheld from a preëmptioner his rights, where they have misconstrued the law, or where any fraud or deception has been practiced which affected their judgment and decision."

One other question remains to be considered. The appellants insist that the order of the Secretary of the Interior cancelling the entry of these lands could be of no legal effect without being approved by the Attorney General. This question is one of no little importance in the administration of the public lands. It has never been directly determined by this court.

The sections of the Revised Statutes upon the construction of which this question depends are the following: "§ 2450. The

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Commissioner of the General Land Office is authorized to decide upon principles of equity and justice, as recognized in the courts of equity, and in accordance with regulations to be settled by the Secretary of the [*Treasury*,] [Interior] the Attorney General, and the Commissioner, conjointly, consistently with such principles, all cases of suspended entries of public lands and of suspended preëmption land claims, and to adjudge in what cases patents shall issue upon the same. § 2451. Every such adjudication shall be approved by the Secretary of the [*Treasury*] [Interior] and the Attorney General, acting as a board; and shall operate only to divest the United States of the title of the lands embraced thereby, without prejudice to the rights of conflicting claimants. § 2452. The Commissioner is directed to report to Congress at the first session after any such adjudications have been made a list of the same under the classes prescribed by law, with a statement of the principles upon which each class was determined. § 2453. The Commissioner shall arrange his decisions into two classes, the first class to embrace all such cases of equity as may be finally confirmed by the board, and the second class to embrace all such cases as the board reject and decide to be invalid. § 2454. For all lands covered by claims which are placed in the first class, patents shall issue to the claimants; and all the lands embraced by claims placed in the second class shall, *ipso facto*, revert to, and become part of, the public domain. § 2455. It may be lawful for the Commissioner of the General Land Office to order into market, after due notice, without the formality and expense of a proclamation of the President, all lands of the second class, though theretofore unproclaimed and unoffered, and such other isolated or disconnected tracts or parcels of unoffered lands which, in his judgment, it would be proper to expose to sale in like manner. But public notice of at least thirty days shall be given by the land officers of the district in which such lands may be situated, pursuant to the directions of the Commissioner. § 2456. Where patents have been already issued on entries which are confirmed by the officers who are constituted the board of adjudication, the Commissioner of the General Land Office, upon the cancelling of the outstanding patent, is authorized to issue a new pat-

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ent, on such confirmation, to the person who made the entry, his heirs or assigns. § 2457. The preceding provisions, from section 2450 to section 2456, inclusive, shall be applicable to all cases of suspended entries and locations, which have arisen in the General Land Office since the twenty-sixth day of June, 1856, as well as to all cases of a similar kind which may hereafter occur, embracing as well locations under bounty-land warrants as ordinary entries or sales, including homestead entries and preëmption locations or cases; where the law has been substantially complied with, and the error or informality arose from ignorance, accident or mistake which is satisfactorily explained; and where the rights of no other claimant or .preemptor are prejudiced, or where there is no adverse claim."

Judge Hanford in the Circuit Court held, as we have seen, that the case in the Land Department after the entry had been suspended should have been adjudicated by the board, composed of the Attorney General, the Secretary of the Interior and the Commissioner of the General Land Office, as provided by sections 2450 and 2451, and that the Secretary of the Interior, without a determination of that board, could not lawfully cancel the entry — citing *Stimson Land Co.* v. *Hollister*, 75 Fed. Rep. 941. The Circuit Court of Appeals said upon this point: "In the numerous decisions of the Supreme Court sustaining the authority of the Commissioner of the General Land Office and of the Secretary of the Interior to affirm, modify or annul the entries of public land made in the local land offices, no reference is made to the provisions of sections 2450 and 2451. Notwithstanding this fact, we are asked to assume that that court must have overlooked these provisions of the statute. We decline to act upon any such presumption."

The legislation embraced in the above sections is the outgrowth of the acts of August 26, 1842, 5 Stat. 534, c. 205; August 3, 1846, 9 Stat. 51, c. 78; July 17, 1848, 9 Stat. 246, c. 101; March 3, 1853, 10 Stat. 258, c. 152, and June 26, 1856, 11 Stat. 22, c. 47. Sections 2450 to 2455, both inclusive, were taken from the act of August 3, 1846, which was confined to "cases of suspended entries *now* existing in said land office;" and the operation of the act was limited to a period of two

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years, but its operation was extended to August 3, 1849, by the act of July 17, 1848 and by the act of March 3, 1853, was extended for a term of ten years from March 3, 1853, and made applicable "as well to cases which were inadvertently omitted to be acted on under said act as to those of a like character and description which have arisen between the date of said act and the present time." And the act of June 26, 1856, revived and continued in force the provisions of the acts of August 3, 1846, and March 3, 1853, as to all cases of suspended entries and locations "where the law has been substantially complied with and the error or informality has arisen from ignorance, accident or mistake, and is satisfactorily explained, and where the rights of no other claimant or preëmptor will be prejudiced, or where there is no adverse claim."

The act of June 26, 1856, is reproduced in the Revised Statutes as section 2457.

Thus after June 26, 1856, the statutes relating to the board were not applicable to every case of suspended entry, but to those specially mentioned in the act of that date. As carried into the Revised Statutes the purpose of this legislation is, where the law has been substantially complied with, to authorize the confirmation of entries which otherwise the land officers would be compelled to reject because of errors or informalities which, if satisfactorily explained as arising from ignorance, accident or mistake, would, in the absence of an adverse claim, be excused by the courts, in administering the principles of equity and justice. The purpose of the legislation was not to limit or restrict the general or ordinary jurisdiction of the land officers. It was rather to supplement that jurisdiction by authorizing them to apply the principles of equity, for the purpose of saving from rejection and cancellation a class of entries deemed meritorious by Congress, but which could not be sustained and carried to patent under existing land laws. There was no necessity for legislation authorizing the rejection or cancellation of irregular entries, but legislation was necessary to save such entries from rejection and cancellation when otherwise meritorious.

Primarily the decision and adjudication of suspended entries

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is, under sections 2450 and 2451, as theretofore, left with the Commissioner of the General Land Office, except that he is to be guided by the principles of equity and justice, and by the regulations settled by the Secretary of the Interior, the Attorney General and the Commissioner, conjointly. The only question is whether all decisions of the Commissioner upon such suspended entries must be submitted to the Secretary of the Interior and the Attorney General, acting as a board, for approval.

If the matter rested upon section 2450 and the first part of section 2451, it might well be contended that a decision rejecting or cancelling a suspended entry should, equally with a decision sustaining such an entry, be submitted to the board for approval. But the latter part of section 2451 does not sustain that view. It is there declared that "every such adjudication," if approved by the board, "shall operate only to divest the United States of the title of the lands embraced thereby." A decision merely rejecting or cancelling the entry could not, with or without the approval of the board, have the effect of divesting the United States of its title. That effect could only flow from a decision sustaining the entry, and since the effect of a decision by the Commissioner such as is required to be submitted to the board and of an approval thereof by the board, is to divest the United States of its title, it follows that only decisions sustaining irregular entries are required to be submitted to the board for its approval. Decisions rejecting or cancelling such entries have the force and effect otherwise accorded to them by the general land laws, and are subject to the appellate or supervisory authority of the Secretary of the Interior as in other instances.

The reasons for requiring the approval by the Secretary of the Interior and the Attorney General of decisions of the Commissioner sustaining irregular entries, under this exceptional legislation, do not apply to decisions rejecting and cancelling such entries. In the one instance claims to public lands are sustained, although acquired in an irregular manner, while in the other such claims are rejected and the public title preserved.

Hackley's entry of the lands in controversy was not suspended because of any error or informality therein arising from igno-

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rance, accident or mistake susceptible of explanation, but because of the charge that the same was unlawfully and speculatively made for the benefit of others and not for his own exclusive use and benefit. The suspension was ordered with a view to an investigation and hearing upon that charge. The decision of the Commissioner sustaining the entry, following this investigation and hearing, was not therefore rendered in pursuance of the special authority conferred upon him by sections 2450 to 2457 of the Revised Statutes, but under the general authority given to him, in respect of the public lands, by sections 441, 453 and 2478 of the Revised Statutes and by the act of June 3, 1878, under which Hackley's entry was made.

We are of opinion that the Commissioner's decision having been made under his general authority, and not under the exceptional authority given by sections 2450 to 2457, was not required to be submitted to the Secretary of the Interior and the Attorney General, acting as a board, for approval, but was subject to the appellate or supervisory authority of the Secretary of the Interior under sections 441, 453 and 2478 of the Revised Statutes. *Knight* v. *United States Land Association*, 142 U. S. 161, 177. It follows that the Secretary of the Interior in reversing the decision of the Commissioner of the General Land Office and in rejecting and cancelling Hackley's entry did not exceed the jurisdiction conferred upon him by law.

The matter determined by the decision of the Secretary was whether Hackley's entry was made in good faith for his own exclusive use and benefit. After notice, investigation and hearing, the Secretary of the Interior determined that question against Hackley. In the absence of a charge that this decision was fraudulently given or obtained—and no such charge is made—the Secretary's determination of this question of fact is conclusive upon the courts. This is established by repeated decisions. And if the charge against Hackley's entry be considered as one of fraud, involving a mixed question of fact and law, still the decision of the Secretary of the Interior cancelling that entry fully states the evidence or facts from which the fraud was held by him to be deducible as a matter of law. Upon an examination of that decision and of the evidence or facts there-

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in recited we are not prepared to hold that any error of law was committed by that officer.

This disposes of all the questions in the case that need be noticed, and the decree below is

Affirmed.

MAY *v.* NEW ORLEANS.

No. 332. Argued March 6, 7, 1900. — Decided May 21, 1900.

May & Co., merchants at New Orleans, were engaged in the business of importing goods from abroad, and selling them. In each box, or case in which they were brought into this country, there would be many packages, each of which was separately marked and wrapped. The importer sold each package separately. The city of New Orleans taxed the goods after they reached the hands of the importer (the duties having been paid) and were ready for sale. *Held:*

(1) That the box, case or bale in which the separate parcels or bundles were placed by the foreign seller, manufacturer or packer was to be regarded as the original package, and when it reached its destination for trade or sale and was opened for the purpose of using or exposing to sale the separate parcels or bundles, the goods lost their distinctive character as imports and each parcel or bundle became a part of the general mass of property in the State and subject to local taxation;

(2) That *Brown* v. *Maryland*, 12 Wheat. 419, established these propositions: 1. That the payment of duties to the United States gives the right to sell the things imported, and that such right *to sell* cannot be forbidden or impaired by a State; 2. That while the things imported retain their character as imports, and remain the property of the importer, "in his warehouse, in the original form or package in which it was imported," a tax upon it is a duty on imports within the meaning of the Constitution; 3. That a State cannot, in the form of a license or otherwise, tax the right of the importer *to sell*, but when the importer has *so acted upon* the goods imported that they have been incorporated or mixed with the general mass of property in the State, such goods have then lost their distinctive character as imports, and have become from that time subject to state taxation, not because they are the products of other countries, but because they are property within the State in like condition with other property that should contribute, in the way of taxation, to the support of the government which protects the owner in his person and estate.

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Opinion of the Court.

THE case is stated in the opinion of the court.

Mr. D. C. Mellen for plaintiffs in error. *Mr. J. Ward Gurley* was on his brief.

Mr. W. B. Sommerville for defendant in error. *Mr. Samuel L. Gilmore* was on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiffs in error, a commercial firm in New Orleans, brought this action in the Civil District Court, Parish of Orleans, to prevent the enforcement of certain tax assessments made by the city of New Orleans in the year 1897.

The petition alleged that during the whole of the year 1897 the plaintiffs were engaged in importing for sale foreign goods upon all of which they paid the duties and imposts levied by the United States;

That the Board of Assessors for the Parish of Orleans assessed them for that year $2500 on "merchandise and stock in trade," and $1000 under the head of "money loaned on interest, all credits and all bills receivable, money loaned and advanced or for goods sold, all credits of any and every description;" and,

That such assessments were void for the following reasons: 1. All merchandise and stock in trade had and carried by the plaintiffs during 1897 consisted of dry goods imported by them from foreign countries upon which duties, imposts and import taxes were levied by the United States and paid by them, and which were sold only in unbroken original packages as imported, and the assessment thereon was in violation of Article 1, section 10, paragraph 2, of the Constitution of the United States. 2. All the credits and bills receivable of the firm during that year consisted wholly of sums due on the purchase price of the above merchandise sold in unbroken and original packages as imported, and the assessment thereon was in violation of the same constitutional provision. 3. The assessment of $1000 upon "money loaned on interest" was unconstitutional,

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because the plaintiffs at no time during 1897 had any money loaned on interest.

A temporary injunction having been granted against any sale of the plaintiffs' property for the taxes in question, the city answered denying each allegation of the petition.

The only evidence in the case was the testimony of one of the plaintiffs as to the manner in which the company conducted its business. That testimony—using substantially the words of the witness—may be thus summarized:

Representatives of the firm went to Europe and obtained from different manufacturers samples of goods which were sent to New Orleans and were used by plaintiffs in obtaining what were known as import orders. Besides that method, if any article was thought good they placed what were known as stock orders—that is, they ordered the goods on their own account. But in most cases the firm sold the goods and did not keep a stock on hand. All their goods were imported and customs duties were paid on them. They did not handle domestic goods.

They sold the goods in the packages in which they were received because the bulk of their business was jobbing trade. Two, three or five hundred packages might be ordered. If the order were for five hundred dozen towels, they might come packed two, three or five dozen in a package. Such a package was never broken. If a small customer came in they might sell him one package. It had often happened that customers desired only a sample, in which case a package might be broken to get it. Upon these samples the importers obtained orders. If an order was given for five hundred dozen towels, put up in packages of five dozen each when shipped to the firm by the manufacturer in Europe, they would be enclosed in a wooden case. Cases containing such orders might not come to the firm's store at all but would go directly to the customer unopened. But if there were two or three orders in a case it would be brought to the store, opened, and the different orders taken out. But they never opened any of the packages in the case.

An import order was one placed on samples to be manufactured, and about sixty-five per cent of the firm's business was

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done by import orders. They would submit to the buyer a line of samples and he would give an import order with the understanding that the goods ordered were to be manufactured and the delivery of them not made for three or four months. If he placed a stock order it was for goods that were in the store ready for delivery.

Goods were always ordered on the firm's own account. They might receive an order for two hundred dozen towels, but give an order on the manufacturer for five hundred dozen, for three hundred of which they had no order but which they might sell while in process of manufacture. They were the owners of all goods that came to them upon those orders.

The lace handled by them was put up in cartons or pasteboard boxes, each box containing twelve pieces of lace, each piece twelve yards long. In filling orders a number of these cartons or boxes were put in another box or case by the manufacturer and so received by the firm. If a case contained only one order it was sent directly to the customer. If the case happened to contain two or more orders it went to the store, where it was opened and the orders separated.

Bobbinet was received in cases containing thirty, forty or fifty packages of two, three or four pieces each. If a customer wished to buy bobbinet, he was told that he would have to buy at least one package; that they did not sell one piece only but in packages. The bulk of the business in bobbinet was directly on import orders. At times six, seven or eight cases which did not come to the store were sold to one firm. Bobbinet was not sold by the case. If more than one order came in a case it was broken open and the orders separated.

The stock of the firm consisted mostly of bobbinet and household linens. They also kept a number of samples of dolls and toys, household linens, towels, sheets, embroideries and laces.

We here give a part of the examination of the witness: "Q. Some of which goods were sold in these cartons as you describe and not in the original packages? A. Some of which were sold out of stock and some on import orders. Q. Let us make that clear. I understand you to say — let us take this case of cartons of laces. You may order such a quantity of

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laces as would consist of, say, fifty cartons, and the factory ships them to you in a large wooden box? A. The packer does that. The manufacturer does not even put them in a case himself, but gets the packer to do that; and there are certain goods not in the lace line, but in the household linen line, which do not come in cases; they come in bales. Q. I want to get a thorough explanation of the way you get at these goods. Say a dozen or more packages of goods are shipped by the manufacturer in a wooden box for convenience, as I understand many of these cases go direct to your customers? A. A great many. Q. And in other cases, where they contain more than one order, the cases are opened by you and the orders separated? A. Yes; but the order is generally sent in the case itself. The goods may be shipped in a wrapper by express. The case does not signify that this is the original package. The original package is the one in which the goods are put up at the factory. If a manufacturer puts up five dozen towels in a package that package is the original package, and if I open that package I break the original package; but, whether he puts those packages in a case or not, it remains in the original package. The original package is the original wrapper put around the goods at the factory, and is known as such in the trade."

In reference to "Money loaned on interest, all credits and all bills receivable, money loaned and advanced or for goods sold, all credits of any and every description" in the assessment, the witness said that the only property possessed by the firm in 1897 of the kind mentioned in those items were bills receivable. Those bills consisted of money due them on sales of imported goods by customers who had given orders which had been filled but for which they had not paid. Some of these goods were sold out of stock and some on import orders. They had no money loaned on interest in 1897. The firm was continuing to do business in 1898 in the same way as in the previous year.

Upon final hearing the Civil District Court adjudged that the assessment in question was unconstitutional and void, and the injunction against the city was made perpetual. That judgment having been reversed upon appeal with directions to dissolve the injunction and dismiss the petition, the contention

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here is that the plaintiffs in error have been denied rights and immunities secured to them by the Constitution of the United States.

The Supreme Court of Louisiana, speaking by Mr. Justice Blanchard, said, among other things: "The question, then, which the case really presents is, what is the 'original package'? Is it the package in which the goods are put up for convenience by the foreign manufacturer, or is it the case, the box, the covering in which the goods so put up by the manufacturer are packed for shipment? Is the manufacturer's package the original package in legal interpretation, or must that be held to be the original package which is delivered to the carrier for transportation to the desired destination? If the package put up by the manufacturer be the original package, then plaintiffs' objection to the assessment complained of is well taken. If the case or box in which the goods are placed for shipment be the original package, then their case falls." After referring to some of the adjudged cases, the court said that the authorities supported the contention of the city that the "original package" in this case must be held to be that in which the goods were shipped to and received by the plaintiffs and not the smaller packages put up by the manufacturer and packed in the box delivered to the carrier.

If the goods of the plaintiffs were assessed for taxation before they had ceased to be imports, that is, while in the original packages and before they had, by the act of the importer, become incorporated into the mass of property of the State and were held for use or sale, then the assessment was void under the provision of the Constitution of the United States declaring that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports except those absolutely necessary for executing its inspection laws, as well as under the provision giving Congress power to regulate commerce with foreign nations. Art. 1, §§ 8, 10. Of the correctness of this general proposition, as sustained by the adjudged cases, no doubt is entertained.

Two views of the general question are presented for our consideration.

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One is, that the box, case or bale in which the plaintiffs' goods were brought from Europe was not the original package; that each separate parcel or bundle placed in each box, case or bale was itself an original package; and that within the meaning of the Constitution no one of such separate parcels or bundles lost its distinctive character as an import and became part of the mass of property in the State, liable to local taxation, until after that separate parcel or bundle had been sold by the importers. This is substantially the proposition pressed upon our attention by the plaintiffs.

The other view is that the box, case or bale in which the separate parcels or bundles were placed by the foreign seller, manufacturer or packer was to be regarded as the original package, and that upon the opening of such box, able or case for the purpose of using or exposing to sale such separate parcels or bundles, each parcel or bundle lost its distinctive character as an import and became a part of the general mass of property in the State subject to local taxation. This is the proposition advanced on behalf of the defendant.

Let us first inquire as to the consequences that may follow from the interpretation of the clause of the Constitution relating to state taxation of imports upon which the plaintiffs rest their case. In the view taken by them it would seem to be immaterial whether the separate parcels or packages brought from Europe were left in the shipping box, case or bale after it was opened or were taken out and placed on the shelves or counters in the store of the importer for delivery or sale along with goods manufactured or made in this country. In other words, they argue that the importer may sell each separate package either from the box in which it was transported, after it is opened, or from the shelves or counters in his store, without being subjected to local taxation in respect of any package so brought into the country, provided such separate package be sold or offered for sale in the form in which it was when placed in the box, case or bale by the European manufacture or packer. This means that the power of the State to tax goods, the product of other counties, depends upon the particular form in which the European manufacturer or packer, of his own accord

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or by direction of the importer, has put them up in order to be sent to this country. The necessary result of this position is, that every merchant selling only goods of foreign manufacture, in separate packages, although enjoying the protection of the local government acting under its police powers, may conduct his business, however large, without any liability whatever to state or local taxation in respect of such goods, provided he takes care to have the articles imported separately wrapped and placed in that form in a box, case or bale for transportation to and sale in this country. In this view, if a jeweller desires to buy fifty Geneva watches for the purpose of selling them here without paying taxes upon them *as property*, he need only direct them to be placed in separate cases, however small, and then put them all together in one box. After paying the import duties on all the watches in the box and receiving the box at his store, he may open the box, and the watches, each one being in its own separate case, may then be exposed for sale. According to the contention of the plaintiffs, each watch, in its own separate case, would be an original package, and could not be regarded as part of the mass of property of the State and subject to local taxation, so long as it remained in that form and unsold in the hands of the importer. Other illustrations arising out of the business of American merchants will readily occur to every one. The result would be that there might be upon the shelves of a merchant in this country, ready to be used and openly exposed for sale, commodities or merchandise consisting of articles separately wrapped and of enormous value that could not be reached for local taxation until after he had sold them, no matter how long they had been kept by the importer before selling them. It cannot be overlooked that the interpretation of the Constitution for which plaintiffs contend would encourage American merchants and traders, seeking to avoid state and local taxation, to import from abroad all the merchandise and commodities which they would need in their business.

There are other considerations that cannot be ignored in determining the time at which goods imported from foreign countries lose their character as imports and may be properly regarded as part of the general mass of property in the State

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subject to local taxation. If, as plaintiffs insist, each parcel separately wrapped and marked and put in the shipping box, case or bale, is an original package which, until sold, no matter when, would retain its distinctive character as an import, although the box, case or bale containing them had been opened, and the separate parcels all exposed for sale, what stands in the way of European manufacturers opening branch houses in this country, and selling all their goods put up in the form of separate parcels and packages, without paying anything whatever by way of taxation on their goods *as property protected by the laws of the State in which they do business?* Indeed, under plaintiffs' view, the Constitution secures to the manufacturers of foreign goods imported into this country an immunity from taxation that is denied to manufacturers of domestic goods. An interpretation attended with such consequences ought not to be adopted if it can be avoided without doing violence to the words of the Constitution. Undoubtedly the payment of duties imposed by the United States on imports gives the importer the right to bring his goods into this country for sale, but he does not simply by paying the duties escape taxation upon such goods as property after they have reached their destination for use or trade, and the box, case or bale containing them has been opened and the goods exposed to sale.

Let us see what this court has said when it has had occasion to determine the meaning and scope of the constitutional provision relating to imports.

The leading case is *Brown* v. *Maryland*, 12 Wheat. 419, 436, 441–444. Brown was indicted under an act of the legislature of Maryland supplementary to an act relating to duties on licenses to retailers of dry goods and for other purposes. The second section of the supplementary act provided: "That all importers of foreign articles or commodities of dry goods, wares or merchandise, by bale or package, or of wine, rum, brandy, whiskey and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrel or tierce, shall, before they are authorized *to sell*, take out a license as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to

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take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." Laws, Maryland, 1821–22, c. 246, p. 168. The indictment having been sustained, the case was brought to this court and was argued with great ability.

It is important to observe that the question presented was not one of ordinary taxation upon property, but it was—to use the words of Chief Justice Marshall—"whether the legislature of a State can constitutionally require the importer of foreign articles to take out a *license* from the State *before* he shall be *permitted to sell* a bale or package so imported?" That question was considered with reference to the clause forbidding the States from laying imposts or duties on imports or exports, except such as were absolutely necessary for executing their inspection laws and also with reference to the commerce clause of the Constitution. Declining to lay down any rule as universal in its application, the court said: "It is sufficient for the present case to say, generally, that when the importer has *so acted upon* the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, *in his warehouse, in the original form or package in which it was imported*, a tax on it is too plainly a duty on imports to escape the prohibition in the Constitution." Again: "The object of importation is sale; it constitutes the motive for paying duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. . . . The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties."

On behalf of the State of Maryland it was contended that if the importer acquired the right to sell by the payment of duties, he might exert that right when, where and as he pleased, and that the State could not regulate it; that he might sell by retail, by auction, or as an itinerant pedler; that he might intro-

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duce articles, such as gunpowder, which would endanger the city, into the midst of its population, as well as articles which would endanger the public health, and thus the power of self-preservation would be denied; and that an importer might bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

To these objections the court, speaking by the Chief Justice, responded: "These objections to the principle, if well founded, would certainly be entitled to serious consideration. But, we think, they will be found, on examination, not to belong necessarily to the principle, and, consequently, not to prove that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition. This indictment is against the importer for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the State, breaking up his packages and traveling with them as an itinerant pedler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer. So, if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way. The power to direct the removal of gunpowder is a branch of the police

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power, which unquestionably remains, and ought to remain, with the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State. The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the States, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the Constitution no farther than to prevent the States from doing that which it was the great object of the Constitution to prevent."

These extracts from the opinion in *Brown* v. *Maryland* establish the following propositions:

1. That the payment of duties to the United States gives the right to sell the thing imported, and that such right *to sell* cannot be forbidden or impaired by a State.

2. That a tax upon the thing imported during the time it retains its character as an import and remains the property of the importer, "in his warehouse, in the original form or package in which it was imported," is a duty on imports within the meaning of the Constitution; and

3. That a State cannot, in the form of a license or otherwise, tax the right of the importer *to sell*, but when the importer has *so acted upon* the goods imported that they have become incorporated or mixed with the general mass of property in the State, such goods have then lost their distinctive character *as imports*, and have become from that time subject to state taxation, not because they are the products of other countries, but because they are property within the State in like condition

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with other property that should contribute, in the way of taxation, to the support of the government which protects the owner in his person and estate.

So the question in the present case is whether the plaintiffs, prior to the assessment complained of, had *so acted upon* the goods imported by them as to incorporate them with the mass of the property in the State, and bring them, while in their possession, within the range of local taxation.

We have seen that the plaintiffs, in effect, contend that having paid the duties imposed by the United States they were entitled, without liability to taxation upon the goods as property, to open the boxes in which the separate parcels of goods were transported and put such separate parcels in the hands of agents to be sold wherever, in the State or in the country customers could be found. The separate parcels—such is the effect of the argument—are not to be deemed incorporated into the mass of the property of the State while thus being carried around the country by the importer's agents—no separate parcel, so long as it remained in the particular form in which it was packed in a box or case with other parcels, ceasing to have the character of an import until after it was sold by such agents. This proposition cannot be sustained. We cannot doubt that the goods when placed in the hands of agents for sale, in separate parcels, have been so acted upon by the importer that they have ceased to be imports and have become part of the mass of the property of the State, liable to local taxation. But what is the difference in principle between the case of sales by an importer through travelling agents and the case of an importer who opens the box or case in which his goods, wrapped in separate parcels, were imported, and by employés sells or offers to sell the separate parcels either from the opened box or case in his store or from shelves or counters upon which such parcels have been placed for examination and sale.

In our judgment, the "original package" in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import, and became property

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subject to taxation by the State as other like property situated within its limits. The tax here in question was not in any sense a tax on imports nor a tax for the privilege of bringing the things imported into the State. It was not a tax on the plaintiffs' goods because they were imported from another country, but because at the time of the assessment they were in the market for sale in separate parcels and therefore subject to be taxed as like property, in the same condition, that had its origin in this country. We cannot impute to the framers of the Constitution a purpose to make such a discrimination in favor of property imported from other countries as would result if we approved the views pressed upon us by the plaintiffs. When their goods had been so acted upon as to become a part of the general mass of property in the State the plaintiffs stood, with respect to liability to state taxation, upon the same basis of equality as the owners of like property, the product of this country; the only difference being that the importers paid a duty to the United States for the privilege of importing their goods into this country, and of selling them in the original packages—a duty imposed for the purpose of raising money to carry on the operations of the Government, and in many instances, with the intent to protect the industries of this country against foreign competition. A different view is not justified by anything said in *Brown* v. *Maryland*. It was there held that the importer by paying duties acquired the right to *sell* in the original packages the goods imported—the Maryland statute requiring *a license from the State* before any one could *sell* "by wholesale, bale or package, hogshead, barrel or tierce," goods imported from other countries. But it was not held that the right to sell was attended with an immunity from all taxation upon the goods *as property*, after they had ceased to be imports and had become by the act of the importer a part of the general mass of property in the State. The contrary was adjudged.

Without further reference to authorities we state our conclusion to be that within the decision in *Brown* v. *Maryland* the boxes, cases or bales in which plaintiffs' goods were shipped were the original packages, and the goods imported by them

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Counsel for Parties.

lost their distinctive character as imports and became a part of the general mass of the property of Louisiana, and subject to local taxation as other property in that State, the moment the boxes, cases or bales in which they were shipped reached their destination for use or trade and were opened and the separate packages therein exposed or offered for sale; consequently, the assessment in question was not in violation of the Constitution of the United States.

This disposes of the only Federal question arising on this appeal.

The judgment of the Supreme Court of Louisiana is

Affirmed.

MR. CHIEF JUSTICE FULLER, MR. JUSTICE BREWER, MR. JUSTICE SHIRAS and MR. JUSTICE PECKHAM dissented.

DEWEY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 546. Argued April 10, 1900.—Decided May 28, 1900.

In this case it was rightly decided in the court below, that in determining under the provisions of Rev. Stat. sec. 902, whether the Spanish vessels sunk or destroyed at Manila were of inferior or superior force to the American vessels engaged in that battle, the land batteries, mines and torpedoes, not controlled by those in charge of the Spanish vessels, but which supported those vessels, were to be excluded altogether from consideration, and that the size and armaments of the vessels sunk or destroyed, together with the number of men upon them, were alone to be regarded in determining the amount of the bounty to be awarded.

THE case is stated in the opinion of the court.

Mr. H. A. Herbert and *Mr. Benjamin Micou* for appellant and others.

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Mr. William B. King for other officers and men.

Mr. Assistant Attorney General Pradt for the United States.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was an action in the Court of Claims to recover bounty money earned by the plaintiff in error as the commanding officer of the American fleet at the naval battle of Manila on the 1st day of May, 1898.

The statute under which the action was brought is as follows: "Rev. Stat. § 4635. A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which is sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force, and of two hundred dollars if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which is immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture."

The mode in which bounty money earned under that section was to be divided is indicated by the following provisions relating to the distribution of prize money:

"§ 4631. All prize money adjudged to the captors shall be distributed in the following proportions:

"First. To the commanding officer of a fleet or squadron, one twentieth part of all prize-money awarded to any vessel or vessels under his immediate command.

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"Second. To the commanding officer of a division of a fleet or squadron, on duty under the orders of the commander-in-chief of such fleet or squadron, a sum equal to one fiftieth part of any prize-money awarded to a vessel of such division for a capture made while under his command, such fiftieth part to be deducted from the moiety due to the United States, if there be such moiety, otherwise from the amount awarded to the captors; but such fiftieth part shall not be in addition to any share which may be due to the commander of the division, and which he may elect to receive, as commander of a single ship making or assisting in the capture.

"Third. To the fleet-captain, one-hundredth part of all prize-money awarded to any vessel or vessels of the fleet or squadron in which he is serving, except in a case where the capture is made by the vessel on board of which he is serving at the time of such capture; and in such case he shall share, in proportion to his pay, with the other officers and men on board such vessel.

"Fourth. To the commander of a single vessel, one tenth part of all the prize-money awarded to the vessel under his command, if such vessel at the time of the capture was under the command of the commanding officer of a fleet or squadron, or a division, and three twentieths if his vessel was acting independently of such superior officer.

"Fifth. After the foregoing deductions, the residue shall be distributed and proportioned among all others doing duty on board, including the fleet-captain, and borne upon the books of the ship, in proportion to their respective rates of pay in the service."

It may be here stated that the provisions for prize-money and bounty to the navy were repealed by an act of Congress approved March 3, 1899, which declares that "all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed." 30 Stat. 1004, 1007, c. 413, § 13.

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The American vessels taking part in the battle were the Olympia, Baltimore, Boston, Raleigh, Concord, Petrel, McCulloch, Nanshan and Zafiro.

The number of officers and men on those vessels during the battle was 1836.

The Spanish vessels taking part in the battle were the Reina Cristina, Castilla, Don Juan de Austria, Don Antonio de Ulloa, General Lezo, Marquez del Duero, Argos, Velasco, Isla de Mindanao, Isla de Cuba, Isla de Luzon, Manila, and two torpedo boats. The Reina Cristina, Castilla, Don Antonio de Ulloa, General Lezo, Marquez del Duero, Argos, Velasco, Isla de Mindanao and the two torpedo boats were destroyed by the American vessels. The Don Juan de Austria, Isla de Cuba and Isla de Luzon were disabled and put out of action in the battle, and were captured; but they were subsequently floated and repaired by the United States and now constitute a part of the American navy. The Manila was captured in the same engagement.

No claim for bounty under section 4635 is made in the present action on account of the sinking of the Don Juan de Austria, Isla de Cuba and the Isla de Luzon, because proceedings are to be begun in the Supreme Court of the District of Columbia to condemn those vessels as prize of war, the claimant reserving the right to make such claim hereafter, if it should be held that the vessels are not subject to condemnation in prize.

The total number of men on board the Spanish vessels during the battle of Manila was 2973. The total number on board the Spanish vessels destroyed was, at the commencement of the action, 1914.

The enemy's vessels were supported by land batteries and by mines and torpedoes in the entrance to Manila Bay and in the bay itself, and some of those in the bay exploded during the action.

It was found as a fact by the Court of Claims — and this court must assume it to be true — that taking into consideration the guns at Corregidor, El Fraile and other forts at the entrance of the bay and those at Manila and Cavite, and the torpedoes and mines in the bay and the entrance to it, the enemy's force was superior to the force of the vessels of the United

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States; but that excluding shore batteries and submarine defences, the American vessels and armaments were superior in force to the Spanish vessels.

The court below — all its members concurring — was of opinion that the land batteries, mines and torpedoes that supported the Spanish vessels during the naval engagement in Manila Bay should be excluded from consideration, and that the claim of the plaintiff came within the clause of the statute allowing the sum of one hundred dollars for each person on board of the vessels sunk or destroyed "if the enemy's vessel was of inferior force," and not within the clause allowing the sum of two hundred dollars, "if [the enemy's vessel was] of equal or superior force." Judgment was accordingly entered against the United States for the sum of $9570, upon the basis of one hundred dollars for each person on board, at the commencement of the engagement, of the enemy's vessels sunk or destroyed.

The counsel have called our attention to several cases in this and other courts. Do any of those cases constitute a direct adjudication of the question now before us?

In *The Ironclad Atlanta*, 3 Wall. 425, 432, the question was whether a certain American vessel, the Nahant, was to be regarded as one of the capturing vessels in a naval engagement in Wassau Sound, Georgia, in 1863. The court said: "The importance of the point is this: the Weehawken was confessedly inferior in force to the Atlanta, and if she is alone to be regarded in the comparison of forces, the whole prize-money goes to the captors. On the other hand, the combined force of the two monitors was superior to that of the Atlanta, and if both are to be regarded as capturing vessels, only one half of the prize-money goes to the captors, and the decree must be affirmed. The mere fact that the only shot fired and the only damage done was by the Weehawken is not decisive. Other circumstances must be taken into account in determining the matter — such as the force, position, conduct and intention of the Nahant. The two vessels were known to be under the same command, and of nearly equal force. The Atlanta descended the sound to attack both, and governed herself with reference to their combined action. It is not reasonable to suppose that

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her course would have been the one pursued, had she had only the Weehawken to encounter. Besides, the fire of the Atlanta was directed entirely to the Nahant, and of course diverted from her consort. It is possible that a different result might have followed had the fire been turned upon the Weehawken. This diversion must be considered in every just sense of the terms as giving aid to her. Again, the power of the shot of the Weehawken had evidently surprised the officers of the Atlanta, who found their vessel speedily disabled and their crew demoralized. The advance upon her, at full speed, of a second monitor, of equal force, ready to inflict similar injuries, may have hastened the surrender. It can hardly be supposed that the approach of the second monitor did not enter into the consideration of the captain and officers of the Atlanta. If the shot from the guns of one of the monitors could, in a few moments, penetrate the casemate of the Atlanta, crush in the bar of her pilot-house, and prostrate between forty and fifty of her men, her captain might well conclude that the combined fire of both would speedily sink his vessel and destroy his entire crew. It cannot be affirmed, nor is it reasonable to suppose, that any of the incidents of the battle would have occurred as they did if the Nahant had not been present in the action."

Another case referred to is that of *The Siren*, 13 Wall. 389, 395. That was a case in prize arising out of certain captures near Charleston, South Carolina, in 1865, of rebel vessels during the late civil war, as the result of the joint action of the land and naval forces of the United States. This court, affirming the judgment of the District Court for the District of Massachusetts, held that Congress had made no provision in reference to joint captures by the army and navy, and that such captures enured exclusively to the benefit of the United States. The court said: "We have already adverted to the ingress of the navy into the harbor of Charleston on the morning of the 17th day of February. At nine o'clock that morning an officer of the land forces hoisted the national flag over the ruins of Fort Sumpter. Flags were also raised over Forts Ripley and Pinckney. At ten o'clock a military officer reached Charleston. The mayor surrendered the city to him. Four hundred and

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fifty pieces of artillery, military stores, and much other property were captured with it. Contemporaneously with these things was the seizure of the Siren by the Gladiolus, and the approach and arrival of the rest of the fleet. The two forces were acting under the orders of a common government, for a common object, and for none other. They were united in their labors and their perils, and in their triumph they were not divided. They were converging streams toiling against the same dike. When it gave way both swept in without further obstruction. The consummation of their work was the fall of the city. Either force, after the abandonment of their defences by the rebels, could have seized all that was taken by both. The meritorious service of the Gladiolus was as a salvor, and not as a captor. Precedence in the time of the arrival of the respective forces is an element of no consequence. Upon principle, reason and authority, we think the judgment of the District Court was correctly given."

The case chiefly relied upon by the plaintiff is *United States* v. *Farragut*, 22 Wall. 406. The question now presented might perhaps have been determined under the pleadings in that case, if it had not been withdrawn from consideration before this court rendered its judgment. Admiral Farragut and others of the American navy filed a libel in admiralty in the Supreme Court of the District of Columbia on account of certain prizes taken below New Orleans in April, 1862. The plaintiff and the Government referred the cause to the determination and award of certain persons, whose award was to be final upon all questions of law and facts involved — the award to be entered as a rule and decree of court in the case, with the right also of either party to appeal to this court as from other decrees or judgments in prize cases. The arbitrators made an award, holding among other things that certain captures were not a conjoint operation of the army and navy of the United States. Exceptions were filed to the award, as erroneous in point both of law and fact. The exceptions were overruled and a decree was entered for the claimants. After the case came to this court the Attorney General, according to the report of the case, dismissed the appeal as to certain property covering $613,520 of the aggregate

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sum allowed by the decree, and that sum was distributed among the captors. That part of the case, it is stated, raised the very question now presented, and it is contended that the action of the Attorney General should be regarded as indicating the interpretation placed upon the statute by the Executive Department. We cannot accept this view. It does not appear from the report of the case what reasons induced the Attorney General to dismiss the appeal of the Government as to the matters referred to. It may have been because of the conviction that, under the facts disclosed by the record, the capture in question was not the result of the conjoint action of the army and navy, but of the action alone of the navy. It is sufficient to say that this court regarded the statement by the arbitrators that the capture was not the joint act of the army and navy as binding upon it, and what appears in the opinion about other points has no bearing upon the present case.

Another case referred to by counsel is *Porter* v. *United States*, 106 U. S. 607, 611. But the decision there did not go beyond the point that the act of June 30, 1864, 13 Stat. 306, 311, c. 174, did not allow bounty where the vessels of the enemy, during the late rebellion, were destroyed by the combined action of the land and naval forces of the United States. The court said: "Prize-money, or bounty in lieu of it, is not allowed by the laws of Congress where vessels of the enemy are captured or destroyed by the navy with the coöperation of the army. To win either, the navy must achieve its success without the direct aid of the army, by maritime force only. No pecuniary reward is conferred for anything taken or destroyed by the navy when it acts in conjunction with the army in the capture of a fortified position of the enemy, though the meritorious services and gallant conduct of its officers and men may justly entitle them to honorable mention in the history of the country."

Nor has *The Selma*, 1 Lowell, 30, 34, any bearing upon the present discussion. That case arose out of certain captures made in the action of August 5, 1864, in the bay of Mobile. It was there decided—and nothing else was decided—that in order to entitle a vessel to participate in the distribution of a

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prize, its situation during the naval engagement must have been such that it could have rendered assistance in the actual conflict in which the prize was taken. The court said: "Suppose it had happened in the case now before me, as once occurred on the Mississippi under the same great captain, that only a small number of vessels had made good the passage of the forts; and that they had found themselves only equal or inferior in force to the enemy within, and had then succeeded by their skill and gallantry in making this capture. It would be impossible, I think, under the case of *The Atlanta*, or on principle, to hold that the vessels outside were actual takers, and to reduce the credit and reward of the conquerors to the level of a capture by superior force. And it will not be easy under our law to define actual captors in such a way as not to require of them at least the qualifications of position and power to do service which the statute peremptorily imposes on constructive takers."

We have referred quite fully to these cases because they were made the subject of comment by counsel. But we do not think that any of them meet the precise question now presented. They throw no light on the inquiry whether, in estimating the force of the enemy's vessel, the support furnished by land batteries, mines and torpedoes is to be taken into consideration.

The words in the existing statute relating to the distribution of prize-money are not entirely new. In the act of March 2, 1799, 1 Stat. 709, 715, c. 24, § 5, relating to the navy of the United States, it was provided: "That all captured national ships or vessels of war shall be the property of the United States—all other ships or vessels, being of superior force to the vessel making the capture, in men or in guns, shall be the sole property of the captors—and all ships or vessels of inferior force shall be divided equally between the United States and the officers and men of the vessel making the capture."

In an act of April 23, 1800, 2 Stat. 45, 53, c. 33, § 7, for the better government of the navy, it was provided: "That a bounty shall be paid by the United States of twenty dollars for each person on board any ship of an enemy at the commencement of an engagement, which shall be sunk or destroyed by

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any ship or vessel belonging to the United States of equal or inferior force, the same to be divided among the officers and crew in the same manner as prize-money."

The fourth section of the act for the better government of the navy, approved July 17, 1862, 12 Stat. 600, 606, c. 204, § 4, contained this provision: "That a bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement which shall be sunk or otherwise destroyed in such engagement, by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force; and of two hundred dollars, if of equal or superior force; to be divided among the officers and crew in the same manner as prize-money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of their class in the navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which shall be immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture."

Then came the act of June 30, 1864, 13 Stat. 306, 310, c. 174, § 11, regulating prize proceedings and the distribution of prize-money. The eleventh section of that act is substantially the same as the fourth section of the act of 1862, and is reproduced in § 4635 of the Revised Statutes on which the claimant bases his action against the United States.

It thus appears that Congress, in providing for bounty to be paid by the United States on account of enemy vessels sunk or otherwise destroyed by any ship or vessel belonging to the United States, has never prescribed any other rule than to give the smaller amount when the enemy's *vessel* was of inferior force, and the larger amount when the enemy's *vessel* was of equal or superior force. We are asked to construe the words in the present statute "one hundred dollars, if the enemy's

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vessel is of inferior force, and two hundred dollars if of equal or superior force," to mean just what it would mean if the question of the inferiority or superiority of the enemy's vessel was made, by express words, to depend upon the inquiry whether it was or was not supported in the naval engagement by land batteries, mines and torpedoes under the charge of others than those having the management of the enemy's vessel. We cannot do that without going far beyond the obvious import of the words employed by Congress. Of course, our duty is to give effect to the will of Congress touching this matter. But we must ascertain that will from the words Congress has chosen to employ, interpreting such words according to their ordinary meaning as well as in the light of all the circumstances that may fairly be regarded as having been within the knowledge of the legislative branch of the Government at the time it acted on the subject. There is undoubtedly force in the suggestion that in rewarding officers and sailors who have sunk or destroyed the enemy's vessels in a naval engagement it is not unreasonable that all the difficulties, of every kind, with which they were actually confronted when engaging the enemy should be taken into consideration. But that was a matter which we cannot suppose was overlooked by Congress; and we are not at liberty to hold that it proceeded upon the broad basis suggested, when it expressly declared that the amount of its bounty shall depend upon the question whether "the enemy's *vessel*" —not the enemy's vessel *and* the land batteries, mines and torpedoes, by which it was supported—was of inferior or of equal or superior force.

In our examination of this case we have not forgotten the skill and heroism displayed by the distinguished commander of our fleet in the battle of Manila, as well as by the officers and sailors acting under his orders. All genuine Americans recall with delight and pride the marvelous achievements of our navy in that memorable engagement. But this court cannot permit considerations of that character to control its determination of a judicial question or induce it to depart from the established rules for the interpretation of statutes. Nor can we allow our judgment to be influenced by the circumstance that Congress

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has recently repealed all statutes giving bounty to officers and soldiers of the navy for the sinking or destruction hereafter, in time of war, of an enemy's vessels—thereby, it may be assumed, indicating that in the judgment of the legislative branch of the Government the policy of giving bounties to the navy was not founded in wisdom and should be abandoned. This court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress. What is termed the policy of the Government in reference to any particular subject of legislation, this court has said, "is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." *Hadden* v. *The Collector*, 5 Wall. 107, 111. Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such. Here, the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress, as thus plainly expressed. *United States* v. *Fisher*, 2 Cranch, 358, 399; *Lake County* v. *Rollins*, 130 U. S. 662, 670.

In our opinion, the Court of Claims did not err in holding that in determining whether the Spanish vessels sunk or destroyed at Manila were of inferior or superior force to the American vessels engaged in that battle, the land batteries, mines and torpedoes not controlled by those in charge of the Spanish vessels but which supported those vessels, were to be excluded altogether from consideration, and that the size and armaments of the vessels sunk or destroyed, together with the number of men upon them, were alone to be regarded in determining the amount of the bounty to be awarded. In that view the decree below was right, and it is

Affirmed.

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FULLER, C. J., WHITE and MCKENNA, JJ., dissenting.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA, dissenting.

Claimant in prosecuting this case, in effect, represents the claims of all the officers and men engaged in the battle of Manila Bay, May 1, 1898. The question is not whether there was a grant of bounty, for that is not disputed. It is simply as to the amount of bounty, and the correct result turns upon the construction of the statute. There being no controversy in respect of the existence of the grant, I am of opinion that the rule of strict construction does not apply, and that the statute, in view of its object, should be construed liberally in favor of the beneficiaries. If so construed, the judgment ought to be reversed.

The applicable statutory provision is as follows:

"A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which is sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force, and of two hundred dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; . . ."

The obvious object of the law was to encourage personal gallantry and enterprise. If the hostile force was equal or superior then the bounty was to be double what it would be if the enemy's force was inferior, because the hazards to be run were so much the greater. But the bounty was limited in total amount by the number of persons on board the vessels of the enemy, which appears to have been considered to be a practicable restriction.

The chief distinction, as a military achievement, of the victory of Manila Bay, is that the American fleet, unaided by an army, attacked a force composed of ships supported by powerful shore defences, together with submarine mines and torpedoes; and, in defiance of these open and hidden dangers, in ad-

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dition to the power of the enemy's fleet, sailed in, and not only destroyed or captured all the opposing vessels, but captured or silenced the shore batteries. To omit consideration of these circumstances in determining pecuniary reward under the statute seems to me to be altogether unreasonable, and yet it is held that in comparing the opposing forces, the shore batteries and submarine mines and torpedoes, which our fleet was compelled to encounter, should not be taken into account, though the bounty could not rise above the number of persons on the enemy's ships.

It is my judgment that the intent plainly was that the entire opposing forces should be compared, and that the shore batteries, mines and torpedoes, protecting and defending the vessels of the enemy, should be included in estimating the rate of bounty, although they were, of course, not armaments or means of attack or defence, directly located on the enemy vessels themselves. Indeed, the words of the statute, if literally construed, might be limited to engagements of single vessels on each side, yet as to this the principal opinion correctly applies a liberal construction, and any other would be preposterous. But if a liberal construction be proper at all, why not altogether?

The action of the Government in respect of the taking of vessels by Admiral Farragut in the capture of New Orleans, has great significance. That case involved an award made by a distinguished board of arbitrators, Henry W. Paine, of Massachusetts; Thomas J. Durant, of the District of Columbia, and Gustavus V. Fox, then late Assistant Secretary of the Navy, one of whose findings was: "That in the engagement which resulted in the capture of those ships, the entire force of the enemy was superior to the force of the United States ships and vessels so engaged." This finding was conceded to have included the forts and batteries on shore, but that was not definitely stated. The executive department acquiesced in the award of the arbitrators on this branch of the case without demanding a more specific finding, and this court was not called upon to determine the precise question. 22 Wall. 406.

The Siren, 13 Wall. 389, is not to the contrary, inasmuch as that was a case of joint capture by the army and navy, and

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Counsel for Parties.

Congress had made no grant in such circumstances. Here the victory was that of the navy alone, and the pecuniary fruits under this statute should not be diminished because the opposing force was partly on shore or under water.

Undoubtedly it is our duty to give effect to the will of Congress, but in ascertaining its will the object Congress manifestly sought to attain must be recognized, and should be controlling, unless positively defeated by the language used.

I am unable to concur in the opinion and judgment of the court, and am authorized to say that MR. JUSTICE WHITE and MR. JUSTICE MCKENNA concur in this dissent.

BARDES *v.* HAWARDEN BANK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

No. 503. Submitted January 31, 1900. — Decided May 28, 1900.

The provisions of the second clause of section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.

The District Court of the United States can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy.

THE case is stated in the opinion of the court.

Mr. Clarence A. Brandenburg for appellant.

Mr. William Milchrist for appellees.

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Opinion of the Court.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity, filed April 28, 1899, in the District Court of the United States for the Northern District of Iowa, sitting in bankruptcy, by Fred Bardes, a citizen of Iowa, as trustee in bankruptcy of the estate of Frank T. Walker, (who had by that court been adjudged a bankrupt upon his own petition,) against the First National Bank of Hawarden, Iowa, a corporation created and existing under the acts of Congress relating to national banks, and against citizens of Iowa and of South Dakota, to set aside a conveyance of goods, of the value of $3500, alleged to have been made by the bankrupt, within four months before the institution of the proceedings in bankruptcy, to the defendants, and to compel them to account for the goods or their proceeds, on the ground that the conveyance was in fraud of the provisions of the Bankrupt Act of July 1, 1898, and in fraud of the creditors of the bankrupt. The defendants demurred to the bill, upon the ground that the court could not take jurisdiction of the case. The court sustained the demurrer, and entered a final decree dismissing the bill for want of jurisdiction, but without prejudice to the plaintiff's right to institute proceedings in a court having jurisdiction. The plaintiff took an appeal directly to this court; and the District Judge certified that the bill was dismissed for want of jurisdiction only, and, to the end that this court might be fully advised in the premises, stated in his certificate the following questions as having arisen before him, namely:

"1st. Do the provisions of the second clause of section 23 of the act of Congress, known as the Bankrupt Act of 1898, control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors?

"2d. Can the District Court of the United States under any circumstances entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money

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or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy?

"3d. Can this court, being the District Court for the Northern District of Iowa, take jurisdiction over the suit as it now stands on the record?"

The record clearly shows, with perhaps unnecessary fulness, that the case was decided upon questions of jurisdiction only, and what those questions were. *Huntington* v. *Laidley*, 176 U. S. 668, 676, and cases there cited.

At a former day of this term, a certificate made by the District Judge of the same question, on which he desired the instruction of this court for his guidance, was dismissed by this court, because he was not authorized by the acts of Congress to make such a certificate before deciding the case. *Bardes* v. *Hawarden Bank*, 175 U. S. 526.

By the Bankrupt Act of July 1, 1898, c. 541, trustees in bankruptcy, appointed by the creditors of the bankrupt, or by the court of bankruptcy, take the place and are vested with the powers of assignees in bankruptcy under former bankrupt acts. Among the duties imposed upon such trustees by section 47, are to "(2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court." By section 70, the trustees, upon their appointment and qualification, are vested by operation of law with the title of the bankrupt, as of the date when he was adjudged a bankrupt, in all his property, excepting that exempt by law from execution and liability for debts, and including property transferred by him in fraud of his creditors. And by the fifth clause of section 67, "all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or incumbered as aforesaid shall, if he be adjudged a bankrupt,

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and the same is not exempt from execution and liability for debts by the law of his domicil, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same, by legal proceedings or otherwise, for the benefit of the creditors." 30 Stat. 557, 564, 565.

The present appeal from the final decree of the District Court, dismissing the bill for want of jurisdiction, distinctly presents for the decision of this court the question whether, under the act of 1898, a District Court of the United States, in which proceedings in bankruptcy have been commenced and are pending under the act, has jurisdiction to entertain a suit by the trustee in bankruptcy against a person holding, and claiming as his own, property alleged to have been conveyed to him by the bankrupt in fraud of creditors. This is a question of general importance, upon which there has been much difference of opinion in the lower courts of the United States.

Its determination depends mainly on the true construction of two sections of the Bankrupt Act of 1898, which it may be convenient to set forth in full, as follows:

"SEC. 2. CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.—That the courts of bankruptcy, as hereinbefore defined, viz., the District Courts of the United States in the several States, the Supreme Court of the District of Columbia, the District Courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers, and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided or had their domicil within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside or have their domicil within the United States, but have property within their

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jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations, for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts, and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue

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such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referee; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and, upon complaints of creditors, remove trustees for cause, upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and (19) transfer cases to other courts of bankruptcy. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." 30 Stat. 545.

"SEC. 23. JURISDICTION OF UNITED STATES AND STATE COURTS. —a. The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

"c. The United States Circuit Courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offences enumerated in this act." 30 Stat. 552.

The question of the effect of these two sections, considering the language of each and their relation to one another, may be best approached by first referring to the terms and to the judicial construction of the Bankrupt Act of March 2, 1867, c. 176,

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which was substantially reënacted in the Revised Statutes, and afterwards repealed; and by then comparing the provisions of that act, as so construed, with those of the existing act.

In the act of 1867, the provisions as to the jurisdiction of proceedings in bankruptcy, and as to the original jurisdiction of actions at law and suits in equity, were as follows:

"SEC. 1. That the several District Courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. The said courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court. And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties, and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." 14 Stat. 517; Rev. Stat. §§ 563, 711, 4972, 4973.

"SEC. 2. That the several Circuit Courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition or other proper process, of any party aggrieved,

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hear and determine the case in a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof in term time or vacation. Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee." 14 Stat. 518; Rev. Stat. §§ 4979, 4986.

In *Lathrop* v. *Drake*, (1875) 91 U. S. 516, the jurisdiction conferred on the District Courts and the Circuit Courts of the United States by the Bankrupt Act of 1867 was defined by this court, speaking by Mr. Justice Bradley, as consisting of "two distinct classes: first, jurisdiction, as a court of bankruptcy, over the proceedings in bankruptcy, initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him." And the jurisdiction of the District and Circuit Courts over suits to recover assets of the bankrupt from a stranger to the proceedings in bankruptcy, brought by the assignee in a district other than that in which the decree in bankruptcy had been made, was upheld, not under the provisions of section 1 of that act, giving to the District Court original jurisdiction of proceedings in bankruptcy, and of section 2, giving to the Circuit Court supervisory jurisdiction over such proceedings; but wholly under the distinct clause of section 2, which gave to those two courts concurrent jurisdiction of all suits, at law or in equity, brought "by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee."

In an earlier case, it had been observed by Mr. Justice Clifford, delivering a judgment of this court dismissing an appeal from

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a decree of the Circuit Court in the exercise of its supervisory jurisdiction in bankruptcy, that the jurisdiction conferred by the later clause was "other and different from the special jurisdiction and superintendence described in the first clause of the section;" was "of the same character as that conferred upon the Circuit Courts by the eleventh section of the Judiciary Act" of 1789, and was "the regular jurisdiction between party and party, as described in the Judiciary Act and the third article of the Constitution." *Morgan* v. *Thornhill*, (1870) 11 Wall. 65, 76, 80.

It was also repeatedly held by this court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person, who now claimed it adversely to the assignee, could only be enforced by a plenary suit, at law or in equity, under the second section of the act of 1867; and not by summary proceedings under the first section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend "to the collection of all the assets of the bankrupt," and "to all acts, matters and things to be done under and in virtue of the bankruptcy" until the close of the proceedings in bankruptcy. *Smith* v. *Mason*, (1871) 14 Wall. 419; *Marshall* v. *Knox*, (1872) 16 Wall. 551, 557; *Eyster* v. *Gaff*, (1875) 91 U. S. 521, 525.

The jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, as distinguished from independent suits at law or in equity, was of course exclusive. But it was well settled that the jurisdiction of such suits, conferred by the second section of the act of 1867 upon the Circuit and District Courts of the United States for the benefit of an assignee in bankruptcy, was concurrent with that of the state courts. In *Eyster* v. *Gaff*, just cited, this court, speaking by Mr. Justice Miller, said: "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit Courts have concurrent jurisdiction, and

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that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the Circuit and District Courts of the United States, it is concurrent with and does not divest that of the state courts."

Under the act of 1867, then, the distinction between proceedings in bankruptcy, properly so called, and independent suits, at law or in equity, between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared. Jurisdiction of such suits was conferred upon the District Courts and Circuit Courts of the United States by the express provision to that effect in section 2 of that act, and was not derived from the other provisions of sections 1 and 2, conferring jurisdiction of proceedings in bankruptcy. And the jurisdiction of suits between assignees and adverse claimants, so conferred on the Circuit and District Courts of the United States, did not divest or impair the jurisdiction of the state courts over like cases.

The decisions of this court under the earlier bankrupt act of August 19, 1841, c. 9, are very few in number, and afford little aid in the decision of the present case. The one most often cited in favor of maintaining such a suit as this under the existing law is *Ex parte Christy*, (1845) 3 How. 292. But section 8 of the act of 1841 contained the provision (afterwards embodied in section 2 of the act of 1867, and above quoted,) conferring on the Circuit Courts concurrent jurisdiction with the District Courts of suits, at law or in equity, between assignees in bankruptcy and adverse claimants of property of the bankrupt.

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5 Stat. 446. And Mr. Justice Story in *Christy's case* considerably relied on that provision. 3 How. 314. Moreover, the only point necessary to the decision of that case was that this court had no power to issue a writ of prohibition to the District Court sitting in bankruptcy; much of Mr. Justice Story's opinion in favor of extending the jurisdiction of that court at the expense of the state courts is contrary to the subsequent adjudication of this court in *Peck* v. *Jenness*, (1849) 7 How. 612; and in a still later case this court, speaking by Mr. Justice Curtis, said that the two former cases "are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression." *Carroll* v. *Carroll*, (1853) 16 How. 275, 287.

We now recur to the provisions of the act of 1898. This act has the somewhat unusual feature of inserting at the head of each section a separate title indicating the subject-matter.

Section 2 of this act is entitled "Creation of Courts of Bankruptcy and their Jurisdiction," takes the place of section 1 of the act of 1867, and hardly differs from that section, except in the following particulars:

First. It begins by describing the jurisdiction conferred on "the courts of bankruptcy" as "such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings;" and it ends by declaring that "nothing in this section contained shall be construed to deprive a court of bankrupty of any power it would possess were certain specific powers not herein enumerated."

Second. It specifies in greater detail, matters which are, in the strictest sense, proceedings in bankruptcy.

Third. It includes, among the powers specifically conferred on the courts of bankruptcy, those to "(4) arraign, try and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations, for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;" "(6) bring in and substitute additional persons or parties in

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proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;" and "(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

The general provisions at the beginning and end of this section mention "courts of bankruptcy" and "bankruptcy proceedings."

Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words "at law," in the opening sentence conferring on the courts of bankruptcy "such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings," may have been inserted to meet clause 4, authorizing the trial and punishment of offences, the jurisdiction over which must necessarily be at law and not in equity.

The section nowhere mentions civil actions at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers, in clause 6, to bring in and substitute additional parties "in proceedings in bankruptcy," and, in clause 15, to make orders, issue process and enter judgments, "necessary for the enforcement of the provisions of this act."

The chief reliance of the appellant is upon clause 7. But this clause, in so far as it speaks of the collection, conversion into money and distribution of the bankrupt's estate, is no broader than the corresponding provisions of section 1 of the act of 1867; and in that respect, as well as in respect to the further provision authorizing the court of bankruptcy to "determine controversies in relation thereto," it is controlled and limited by the concluding words of the clause, "except as herein otherwise provided."

These words "herein otherwise provided" evidently refer to section 23 of the act, the general scope and object of which, as

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indicated by its title, are to define the "Jurisdiction of United States and State Courts" in the premises. The first and second clauses are the only ones relating to civil actions and suits at law or in equity.

The first clause provides that "the United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy," (thus clearly recognizing the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity, on the other,) "between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees," restricting that jurisdiction, however, by the further words, "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants." This clause, while relating to the Circuit Courts only, and not to the District Courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.

But the second clause applies both to the District Courts and to the Circuit Courts of the United States, as well as to the state courts. This appears, not only by the clear words of the title of the section, but also by the use, in this clause, of the general words, "the courts," as contrasted with the specific words, "the United States Circuit Courts," in the first and in the third clauses.

The second clause positively directs that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

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Opinion of the Court.

Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any state court of competent jurisdiction; or, if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws or treaties of the United States, he could have brought suit in the Circuit Court of the United States. Act of August 13, 1888, c. 866; 25 Stat. 434. He could not have sued in a District Court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of Congress, a District Court has the powers of a Circuit Court, or is given jurisdiction of a particular class of civil suits.

It was argued for the appellant that the clause cannot apply to a case like the present one, because the bankrupt could not have brought a suit to set aside a conveyance made by himself in fraud of his creditors. But the clause concerns the jurisdiction only, and not the merits, of a case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. The bankrupt himself could have brought a suit to recover property, which he claimed as his own, against one asserting an adverse title in it; and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it.

The Bankrupt Acts of 1867 and 1841, as has been seen, each contained a provision conferring in the clearest terms on the Circuit and District Courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of property of the bankrupt. We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts.

On the contrary, Congress, by the second clause of section 23

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of the present Bankrupt Act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, "unless by consent of the proposed defendant," of which there is no pretence in this case.

One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the State, to the greater economy and convenience of litigants and witnesses. See *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 511, 513.

Two or three minor provisions of the Bankrupt Act of 1898, sometimes supposed to be inconsistent with this conclusion, may be briefly noticed.

Section 26 provides that the trustee may, pursuant to the direction of the court of bankruptcy, submit to arbitration any controversy arising in the settlement of the estate, and that the award of the arbitrators "may be filed in court," evidently meaning the court of bankruptcy. But no such arbitration could be had without the consent of the adverse party to the controversy in question.

The powers conferred on the courts of bankruptcy by clause 3 of section 2, and by section 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what courts the trustee may sue him.

The supervisory jurisdiction over proceedings in bankruptcy, conferred by the act of 1867 upon the Circuit Courts of the United States, and by the existing act upon the Circuit Courts of Appeals, does not affect this case. 30 Stat. 553.

For the reasons above stated, we are of opinion that the questions of jurisdiction certified by the District Judge should be answered as follows:

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Syllabus.

"1st. The provisions of the second clause of section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.

"2d. The District Court of the United States can, by the proposed defendants' consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy.

"3d. The District Court for the Northern District of Iowa cannot take jurisdiction over this suit as it now stands on the record."

The result is that the decree of the District Court, dismissing the bill for want of jurisdiction, must be

Affirmed.

MITCHELL v. McCLURE.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 237. Submitted April 12, 1900.—Decided May 28, 1900.

A District Court of the United States has no jurisdiction, without the proposed defendant's consent, to entertain an action of replevin by a trustee in bankruptcy to recover goods conveyed to the defendant by the bankrupt in fraud of the Bankrupt Act and of his creditors.

Bardes v. *Hawarden Bank*, *ante*, 524, followed.

THE case is stated in the opinion of the court.

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Mr. Thomas Patterson and *Mr. S. Duffield Mitchell* for plaintiff in error.

Mr. John S. Ferguson for defendants in error.

Mr. Justice Gray delivered the opinion of the court.

This was an action of replevin in the District Court of the United States for the Western District of Pennsylvania by a trustee in bankruptcy, appointed by that court, a citizen of Pennsylvania, to recover a stock of goods, of the value of $2500, in the possession of the defendants, citizens of Pennsylvania and residents of that district, and alleged to have been conveyed to them by the bankrupt, within four months before the institution of proceedings in bankruptcy, in fraud of the Bankrupt Act of 1898, and of the creditors of the bankrupt. The District Court, on motion of the defendant, held that it had no jurisdiction to entertain such an action, and therefore ordered it to be abated. 91 Fed. Rep. 621. The plaintiff sued out a writ of error from this court, and the District Judge certified that the question of jurisdiction was the sole question in issue.

For the reasons stated in *Bardes* v. *Hawarden Bank*, *ante*, 524, just decided,

The judgment is affirmed.

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HICKS v. KNOST.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 512. Submitted May 14, 1900. — Decided May 28, 1900.

A District Court of the United States has jurisdiction, by the proposed defendant's consent, but not otherwise, to entertain a bill in equity by a trustee in bankruptcy to recover property conveyed to the defendant by the bankrupt in fraud of the Bankrupt Act and of his creditors.
Bardes v. *Hawarden Bank*, *ante*, 524, followed.

THE case is stated in the opinion of the court.

Mr. Charles M. Peck for appellant.

Mr. Frederick Hertenstein for appellee.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity in the District Court of the United States for the Southern District of Ohio by a trustee in bankruptcy, appointed by that court, against a creditor of the bankrupts, to recover money to the amount of $2780, paid by the bankrupts to the defendant, with intent to prefer the defendant and to defraud the creditors of the bankrupts, within four months before the institution of the proceedings in bankruptcy. Both parties were citizens of Ohio and residents of that district. The District Court dismissed the bill, for want of jurisdiction. 94 Fed. Rep. 625. The plaintiff appealed to the Circuit Court of Appeals for the Sixth Circuit, which certified to this court the following question:

"Has a District Court of the United States jurisdiction to entertain a bill in equity filed by a trustee in bankruptcy, appointed by it, against a fraudulent grantee or transferee of the bankrupt resident in its district, to recover the property belong-

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ing to the estate of the bankrupt, and by him fraudulently conveyed to defendant?"

For the reasons stated in *Bardes* v. *Hawarden Bank*, just decided, the answer to this question must be that the District Court has such jurisdiction by the consent of the proposed defendant, but not otherwise.

Ordered accordingly.

WHITE *v.* SCHLOERB.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 530. Submitted April 26, 1900. — Decided May 28, 1900.

After an adjudication in bankruptcy, an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun; and the District Court of the United States, sitting in bankruptcy, has jurisdiction by summary proceedings to compel the return of the property seized.

THIS was a petition in equity to the Circuit Court of Appeals for the Seventh Circuit, under the jurisdiction conferred upon that court by the second clause of section 24 of the Bankrupt Act of July 1, 1898, c. 541, to superintend and revise in matter of law the proceedings in bankruptcy of the District Courts of the United States in that circuit. 30 Stat. 553. The Circuit Court of Appeals certified to this court the following statement of the case and the questions of law:

"On September 13, 1899, August T. Schloerb and Eugene B. Schickedantz, who were respectively residents and inhabitants of the Eastern District of Wisconsin, and who were copartners in trade in the said district, filed their voluntary petition in bankruptcy in the District Court of the United States for that district. On the same day they were duly adjudged

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bankrupt by that court, and the matter referred to a referee in bankruptcy for further proceedings according to law. They had at that date a stock of goods contained in a store, the entrance to which was locked by the direction of the referee.

"Thereafter, on September 21, 1899, James Cogan and Bernard Cogan, who were copartners, commenced an action of replevin against the bankrupt in the circuit court of the State of Wisconsin for the county of Winnebago, in which county the store of the bankrupts was located, to recover the possession of certain specified goods, then in the store of the bankrupts, and forming part of their stock of goods. On the same day, the proper undertaking and requisition to the sheriff of the county of Winnebago, according to the law of the State of Wisconsin, were delivered to the petitioner Charles M. White, who was then the sheriff of the county, who delivered it for execution to the petitioner Henry Eckstein, who was the under-sheriff of said sheriff. In pursuance of said requisition, the under-sheriff, on the same day, and before the selection and appointment of a trustee in the bankrupt proceedings, forcibly entered the store of the bankrupts, and took possession of certain goods, part of the goods specified in the writ of replevin.

"On September 23, 1899, the bankrupts presented their petition to the District Court of the United States for the Eastern District of Wisconsin, setting forth the facts above recited, and also alleging that the goods so taken under the writ of replevin were part of a bill of goods purchased by them of the plaintiffs in that writ, and were their lawful property. The petition alleges that the goods were in the possession of the petitioners, the sheriff and under-sheriff mentioned, and John C. Thompson, the attorney for the plaintiffs in the writ of replevin, and asked the court that they be compelled to redeliver the goods to the District Court sitting in bankruptcy, from whose possession they were taken, and that they be enjoined from any disposition thereof. Upon the filing of the petition the District Court issued its mandate requiring the petitioners here, the sheriff, the under-sheriff and the attorney mentioned, to show cause before that court, at a time and place mentioned, why the seizure of the goods under the writ of replevin should not be vacated and set aside,

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and the goods returned to the bankrupts, or placed in the possession of the marshal of the court, or such other person as the court should direct, and why they should not be respectively enjoined from interference with the property so seized, and in the mean time restraining them from such interference. The petitioners specially appeared upon the return day mentioned in the mandate; and moved the District Court to set aside and vacate its mandate or order to show cause, for want of jurisdiction in the court of bankruptcy over the subject-matter; and also presented proof by affidavit to the effect that the assertion of title to the goods in question by the plaintiffs in the writ of replevin was founded upon the claim that the bankrupts had purchased the goods of them upon false and fraudulent representations upon which reliance had been placed, and that before the writ of replevin they had elected to rescind the sale and had demanded of the bankrupts the return of the goods. The court of bankruptcy at the hearing and on October 26, 1899, made the following order: 'It is hereby ordered that the said Charles M. White, Henry Eckstein and John C. Thompson be, and they are hereby, restrained from sale or other disposition of the property mentioned in said petition herein; and they are hereby directed to turn over and deliver the said property, so taken by them from the estate of the bankrupts, to the trustee appointed herein, within twenty days from the date of this order; and it is further ordered that the trustee, on delivery of the said property, keep the same separate and apart from other property, to abide the further order of the court; and that, in case sale of said property is hereafter ordered, the proceeds of said sale be kept separate and apart to abide such further order of the court.' The opinion of the court upon that hearing is reported *In re Schloerb*, 97 Fed. Rep. 326.

"The petitioners here, by their original petition filed in this court, have presented the matters of law raised by the order so made by the District Court sitting in bankruptcy.

"The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

"First. Whether the District Court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized?

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"Second. Whether, after adjudication in bankruptcy, an action in a state court can be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of the adjudication?

"Third. Whether the property of a bankrupt, upon his adjudication in bankruptcy, is *in custodia legis* of the bankruptcy court, and can be taken possession of under process of a state court?"

Mr. Charles W. Felker and *Mr. John C. Thompson* for White.

Mr. Charles Barber and *Mr. Carl D. Jackson* for Schloerb.

Mr. Justice Gray, after making the above statement, delivered the opinion of the court.

The material facts of this case may be briefly recapitulated. After the District Court of the United States had adjudged Schloerb and Schickedantz bankrupts on their own petition, and had referred the case to a referee in bankruptcy, and the referee had taken possession of the bankrupts' stock of goods in their store, and had caused the entrance of the store to be locked up, and before the appointment of the trustee in bankruptcy, a writ of replevin of some of those goods was sued out by other persons against the bankrupts from an inferior court of the State of Wisconsin, and was executed by the sheriff of the county, by his deputy, by forcibly entering the store and taking possession of these goods. The bankrupts thereupon presented to the District Court of the United States a petition, setting forth the above facts, and alleging that the goods replevied were their lawful property, and had been purchased by them of the plaintiffs in replevin, and were now in the possession of the sheriff and his deputy and the attorney of those plaintiffs; and praying that they might be compelled to redeliver the goods to the District Court sitting in bankruptcy, and be restrained from making any disposition thereof. Upon the filing of this petition, the court ordered notice thereof

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to said sheriff, deputy and attorney. In answer thereto, they contended that the court had no jurisdiction over the subject-matter; and offered evidence that the grounds of their action of replevin were that the bankrupts had purchased and obtained the goods from them by false and fraudulent representations on which they relied, and that, before suing out the writ of replevin, they had elected to rescind the sale, and had demanded of the bankrupts a return of the goods. The District Court, upon a hearing, made an order restraining the respondents from selling or otherwise disposing of the goods replevied, and directing them to deliver the goods to the trustee in bankruptcy, and directing the trustee, on such delivery, to keep them apart from other property, to abide the further order of the court.

The questions certified concern, not the trial of the title to these goods, but only the judicial custody and lawful possession of them.

Under sections 33–43 of the Bankrupt Act of 1898 and the Twelfth General Order in Bankruptcy, referees in bankruptcy are appointed by the courts of bankruptcy, and take the same oath of office as judges of United States courts, each case in bankruptcy is referred by the court of bankruptcy to a referee, and he exercises much of the judicial authority of that court. 30 Stat. 555–557; 172 U. S. 657.

At the date of this adjudication in bankruptcy by the District Court of the United States, the goods were in the store of the bankrupts, and in their actual possession, and were claimed by them as their property. On the same date, that court referred the case to a referee in bankruptcy, and by his direction the entrance to the store was locked. The goods were then in the lawful possession of and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States, they could not be taken out of that custody upon any process from a state court.

So far as regards this point, the decision of this court in *Freeman* v. *Howe*, 24 How. 450, more than covers the case. It was there adjudged that property taken and held by a marshal

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on a writ of attachment from a court of the United States, directing him to attach the property of one person, could not be taken from his possession on a writ of replevin from a state court in behalf of another person who claimed the attached property as his own. See also *Peck* v. *Jenness*, 7 How. 612, 625; *Buck* v. *Colbath*, 3 Wall. 334, 341; *Covell* v. *Heyman*, 111 U. S. 176, 182.

The second question certified relates to this point, although it is not so clearly expressed as it might be, and omits to mention in whose possession the property was when the writ of replevin was sued out. To that question, as explained and restricted by the facts set forth in the statement which accompanies it, our answer is: "After an adjudication in bankruptcy, an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun."

The first question remains: "Whether the District Court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized?"

By section 720 of the Revised Statutes, "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Among the powers specifically conferred upon the court of bankruptcy by section 2 of the Bankrupt Act of 1898 are to "(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act." 30 Stat. 546. And by clause 3 of the Twelfth General Order in Bankruptcy applications to the court of bankrupty "for an injunction to stay proceedings of a court or officer of the United States, or of a State, shall be heard and decided by the judge; but he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts." 172 U. S. 657.

Not going beyond what the decision of the case before us

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requires, we are of opinion that the judge of the court of bankruptcy was authorized to compel persons, who had forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody; and therefore our answer to the first question must be: "The District Court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized."

These answers to the first and second questions render any further answer to the third question unnecessary.

Ordered accordingly.

TAYLOR AND MARSHALL *v.* BECKHAM (NO. 1).

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 603. Argued April 30, May 1, 1900. — Decided May 21, 1900.

By the constitution and laws of Kentucky, the determination of contests of the election of Governor and Lieutenant Governor is, and for a hundred years has been, committed to the General Assembly of that Commonwealth.

The Court of Appeals of Kentucky decided that the courts had no power to go behind the determination of the General Assembly in such a contest, duly recorded in the journals thereof; that the office of Governor or of Lieutenant Governor was not property in itself; and, moreover, that, under the constitution and laws of Kentucky, such determination being an authorized mode of ascertaining the result of an election for Governor and Lieutenant Governor, the persons declared elected to those offices on the face of the returns by the Board of Canvassers, only provisionally occupied them because subject to the final determination of the General Assembly on contests duly initiated. *Held:*

(1) That the judgment of the Court of Appeals to the effect that it was not empowered to revise the determination by the General Assembly adverse to plaintiffs in error in the matter of election to these offices was not a decision against a title, right, privilege or immunity secured by the Constitution of the United States; and plaintiffs in error could not invoke jurisdiction because of deprivation, under the circumstances, of property or vested rights, without due process of law;

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(2) That the guarantee by the Federal Constitution to each of the States of a republican form of government was intrusted for its enforcement to the political department, and could not be availed of, in connection with the Fourteenth Amendment, to give this court jurisdiction to revise the judgment of the highest court of the State that it could not review the determination of a contested election of Governor and Lieutenant Governor by the tribunal to which that determination was exclusively committed by the state constitution and laws, on the ground of deprivation of rights secured by the Constitution of the United States.

THIS was an action in the nature of *quo warranto* brought, under the statutes of Kentucky, by J. C. W. Beckham against William S. Taylor and John Marshall, for usurpation of the offices of Governor and Lieutenant Governor of Kentucky, in the Circuit Court of Jefferson County, in that Commonwealth.

The petition averred that at a general election held on the 7th of November, 1899, in the Commonwealth of Kentucky, William Goebel was the Democratic candidate for Governor and J. C. W. Beckham was the Democratic candidate for Lieutenant Governor, and that at said election William S. Taylor and John Marshall were the Republican candidates for the said offices respectively; that after said election the State Board of Election Commissioners, whose duty it was to canvass the returns thereof, canvassed the same, and determined on the face of the returns that said Taylor and said Marshall were elected Governor and Lieutenant Governor, respectively, for the term commencing December 12, 1899, and accordingly awarded them certificates to that effect, whereupon they were inducted into those offices.

The petition further alleged that within the time allowed by law said William Goebel and J. C. W. Beckham gave written notices to Taylor and Marshall that they would each contest the said election on numerous grounds set out at large in the respective notices; that said notices of contest were duly served on said Taylor and Marshall, filed before each house of the General Assembly, and entered at large on the journals thereof; that thereafter Boards of Contests were duly selected by each House of the General Assembly, and sworn to try said contests as required by law; that at the time appointed for

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the hearing the said Taylor and Marshall appeared, and each filed defences and counter notices, and the evidence of contestants and contestees was heard by the Boards from January 15, 1900, until January 29, 1900, inclusive, and upon January 30, 1900, said contests were submitted without argument to the Boards for decision.

That thereafter the Boards, having considered the matters of law and fact involved in the contests, did each separately decide the contest submitted to it, and made out in writing its decision and reported the same to each House of the General Assembly for action thereon.

That in the contest for Governor the Board determined, and so reported to each House of the General Assembly, that William Goebel had received the highest number of legal votes cast for Governor at the election held on November 7, 1899, and that he was duly elected Governor for the term beginning December 12, 1899; and that in the contest for Lieutenant Governor the Board determined and so reported that the contestant Beckham had received the highest number of legal votes cast at said election, and was duly elected to the office of Lieutenant Governor for said term.

The petition also alleged that the reports and decisions of the Contest Boards were thereafter duly adopted and approved by both Houses of the General Assembly in separate and in joint sessions; that there were present in the House of Representatives at said time 56 members and in the Senate 19 members, which was a quorum of each House, and that there were present 75 members in joint session, and that the General Assembly did then and there decide and declare that William Goebel and J. C. W. Beckham had each received the highest number of legal votes cast at said election for the offices of, and were duly elected, Governor and Lieutenant Governor as aforesaid. The Journals of both Houses of the General Assembly, showing the proceedings and facts aforesaid, were referred to and made part of the petition, and attested copies thereof filed therewith.

It was further averred that after the determination of said contest by the General Assembly, the said William Goebel and

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J. C. W. Beckham were duly sworn and inducted into the offices of Governor and Lieutenant Governor of the Commonwealth and at once entered upon the discharge of their respective duties. That thereafter, on the third of February, 1900, William Goebel died, and by law said Beckham was required to discharge the duties of the office of Governor, and accordingly on that day he took the oath prescribed by law, and immediately entered on the discharge of the duties of said office.

It was further alleged that the powers of Taylor as Governor and of Marshall as Lieutenant Governor immediately ceased on the determination of the contest by the General Assembly, but that notwithstanding the premises the said Taylor and Marshall had usurped the said offices of Governor and Lieutenant Governor, and refused to surrender the records, archives, journals and papers pertaining to the office of Governor, and the possession of the executive offices in the Capitol in the city of Frankfort.

The prayer of the petition was "that the defendant, William S. Taylor, be adjudged to have usurped the office of Governor of this Commonwealth, and that he be deprived thereof by the judgment of this court; that this plaintiff be adjudged entitled to the said office and be placed in full possession of said office of Governor, the executive offices provided by the Commonwealth for the use of the Governor, and that all the records, archives, books, papers, journals and all other things pertaining to the said office be surrendered and delivered to this plaintiff, by the said Taylor, and that the said Taylor be enjoined and restrained from further exercising or attempting to exercise the office of Governor of this Commonwealth; that the said John Marshall be adjudged to have usurped the office of Lieutenant Governor of the Commonwealth, and that he be deprived thereof, and declared not entitled to the same by the judgment of this court, and enjoined from assuming to act as such Lieutenant Governor; that plaintiff, Beckham, be adjudged the lawful incumbent of said office; and finally the plaintiff prays for his costs in this behalf expended, and for all proper relief."

Defendants Taylor and Marshall filed answers and amended

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answers and counterclaims, denying any valid proceedings in contest, and alleging in substance that the action of the Boards of Contests and of the General Assembly in the contests was the result of a conspiracy entered into by the members of the Boards and the members of the General Assembly to wrongfully and unlawfully deprive contestees of their offices; that in the execution of this design the members of said Boards were fraudulently selected, and not fairly drawn by lot, as required by law, and that a majority of those selected were persons whose political beliefs and feelings, inclinations and desires on the subject of the contests were known in advance. That the entries on the Journals of the General Assembly were false and fraudulent, and made in pursuance of said conspiracy, and that the pretended decisions were fraudulent and utterly void. That the Senate lacked a quorum at the time of the pretended adoption of the Contest Boards' reports; and that defendant, Taylor, as Governor, on January 31, 1900, refused to permit the members of the General Assembly to meet as the General Assembly at Frankfort, because he had previously adjourned the General Assembly to meet on February 6 at London, in Laurel County.

The notices of contest were averred to have been exactly alike, *mutatis mutandis*, and the notice in respect of the office of Governor was set out as given in the margin.[1]

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[1] "The Contestee, William S. Taylor, is hereby notified that the Contestant, William Goebel, who was more than thirty years of age, and has been a citizen and resident of Kentucky for more than six years, next preceding the 7th day of November, 1899, will contest the election of the said William S. Taylor to the office of Governor of this Commonwealth, before the next General Assembly thereof, to be convened as provided by law, in the city of Frankfort, on the 2d day of January, 1900, and before the Board of Contest to be organized by the said General Assembly for the purpose of determining the contest for Governor; and will then and there contest the right of the said William S. Taylor to the office of Governor of this Commonwealth by virtue of the election held therein on the 7th day of November, 1899, and the certificate of election granted unto the said William S. Taylor by the State Board of Election Commissioners on the 9th day of December, 1899; and will ask the General Assembly and said Board of Contest to determine that the Contestant, William Goebel, was legally and rightfully elected Governor aforesaid, at the said election, and that Wil-

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The following are paragraphs from the answers and amended answers:

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liam S. Taylor was not rightfully or legally elected to said office; and said Contestant will then and there ask the said Board of Contest and the General Assembly to take such proceedings and orders in the matters of said contest as is required by law for his induction into said office.

For grounds of such contest, the Contestant says:

First. In the election held in this Commonwealth on the 7th day of November, 1889, for the office of Governor, the Contestant, William Goebel, was the Democratic candidate, and the Contestee, William S. Taylor, was the Republican candidate for said office of Governor, and were then and there voted for as such candidates; and at said election held in the counties of Knox, Jackson, Magoffin, Pike, Martin, Johnson, Owsley, Lewis, Carter, Pulaski, Bell, Clinton, Russell, Adair, Harlan, Casey, Wayne, Whitley, Todd, Caldwell, Crittendon, Perry, Muhlenburg, Monroe, Metcalf, Butler, Letcher, Leslie, Lee, Laurel, Hart, Greenup, Grayson, Estill, Edmonson, Cumberland, Clay, Breckenridge, Boyd and Allen, and in each precinct thereof, all of the official ballots used, in all of said counties, were printed upon paper so thin and transparent that the printing and the stencil marks thereon, made by the voters, could be distinguished from the back of said ballots; that none of the said ballots used in said counties, were printed upon plain white paper, sufficiently thick to prevent the printing from being distinguished from the back of the said ballots, whereby the secrecy of the said ballots were destroyed, and the said election in all of the said counties rendered void, and the printed vote thereon should not be counted in ascertaining the result of the election in this Commonwealth.

Second. That the said alleged election held in the County of Jefferson and the City of Louisville on the 7th day of November, 1889, was and is void, because the Contestant says that upon that day before the said election, the Governor of the Commonwealth unlawfully called the military forces of the State into active service in said City, armed with rifles, bayonets and gatling guns, for the purposes of overawing, intimidating and keeping Democratic voters from the polls thereof, and did himself, in violation of the law of the land, go to the said City and County the day before said election and assume direction and command of the said military forces and ordered and directed them to go, and they did go, in obedience to said order, to the polling places in said city, on the said day of said election, and thereby many thousand of voters, to wit, more than enough to have changed the result of the said election, were intimidated and alarmed, and failed and refused to go to the polls or to vote on said day; that for this cause the said election in the City of Louisville and County of Jefferson, was not free and equal, but is void, and the said alleged votes cast thereat should not be counted.

Third. The Contestant says that on the day of the said election in the city of Louisville, and County of Jefferson, Sterling B. Toney, one of the

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"Further answering herein defendants, W. S. Taylor and John Marshall, say, each of them is over forty years of age,

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circuit judges of the County and City aforesaid, without authority of law, issued a mandatory injunction, by which he required the legally appointed officers of the election for the City and County aforesaid, to admit in to the polling places during said election many persons who were not authorized or required by law to be in said polling places, and take part in said election and the pretended count of ballots, and were kept and maintained in the said places unlawfully and wrongfully by the said officers of said Judge and the military power of the State, under the direct command of the Governor, by reason of which the votes cast at said election were not fairly counted, but the result left in doubt and uncertainty, and for this cause the said election was void and the alleged and pretended votes cast thereat in said city should not be counted.

Fourth. The said Contestant says that at the said election, held as aforesaid, on the 7th day of November, 1899, in the County of Jefferson and City of Louisville, and Warren, Hopkins, Christian, Knox, Whitley, Pulaski, Bell and divers other counties of this Commonwealth, that many thousands of the legal voters thereof, to wit, more than enough thereof to have changed the result of said election, who were in the employment of the Louisville and Nashville Railroad Company and other corporations, were intimidated by the officers and superior employés of said company and corporations by threats of less employment and discharge from the service of the said company and corporations, and were thereby forced and compelled to vote and did, for this cause, vote for the Contestee for the office of Governor, when in truth and in fact they desired to vote for the Contestant, and would have done so but for such intimidation and duress. For this cause the said election held in said counties was and is void.

Fifth. The Contestant says that before the said election on November 7, 1899, the leaders of the Republican party in the Commonwealth corruptly and fraudulently entered into an agreement and conspiracy with the said officers of the Louisville and Nashville Railroad Company and the American Book Company and other corporations and trusts, by which the said companies, corporations and trusts agreed to furnish large sums of money to be used in defeating the Contestant at said election by bribing and corrupting the voters and election officers of this Commonwealth and debauching the public press thereof; and that in pursuance to the said conspiracy the said companies, corporations and trusts did furnish large sums of money, which were so corruptly and unlawfully used in the counties of Jefferson, Warren, Fayette, Breathitt, Hopkins, Daviess, Logan, Todd, Henderson, Pulaski, Whitley, Knox, Bell, Hardin and divers other counties of the Commonwealth, and by which many thousands of the legal voters thereof were bribed and corrupted, and thereby caused to vote for Contestee. Newspapers were purchased and debauched and officers of said election bribed, and the Contestant deprived of many thousand votes which he would have

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has been a citizen and resident of the State of Kentucky all his life, and likewise a citizen and resident of the United States all his life. They say further that, as hereinafter more specifically

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received but for the unlawful and corrupt conspiracy aforesaid, which votes were sufficient to have elected him.

Sixth. The Contestant further says that in the counties of Knox and Lewis, the County Board of Election Officers, whose duty it was, by law, to correctly certify the result of the election held in their respective counties, were compelled by unlawful mandatory injunctions issued by circuit judges and clerks, to sign false returns and certificates of said election, giving to the Contestee large majorities of the votes cast in said counties; and in the county of Knox, the said board was compelled by duress and open threats of violence from a large body of armed citizens of said county, assembled at the county seat, to sign false and fraudulent certificates. In the county of Jefferson, the officers who held said election at the voting places in the city of Louisville, were compelled to sign like false and fraudulent certificates of said election, by duress, and under threats of Sterling B. Toney, one of the circuit judges of the Commonwealth, who announced his purpose to fine and imprison said officers if they did not sign said false certificates. By reason of the duress aforesaid, and the said unlawful mandatory injunctions, the votes in the said counties and all the precincts thereof, were not correctly counted or certified, and the said votes so certified should not now be counted in determining the result of said election. All of said certificates were signed and made under duress, and would not have been signed but for the facts aforesaid.

Seventh. The Contestant says that in pursuance to a conspiracy of the leaders of the Republican party in Kentucky, and the United States Marshal for the District of Kentucky, to intimidate and deter the Democrats and friends of Contestant from voting for him, said Marshall and other officers and persons threatened to indict many of Contestant's supporters in the United States Court for the District of Kentucky for alleged violation of law in connection with said election, and, in pursuance to said conspiracy, caused their threats to be published in the daily press of the State, and in other forms, and upon the day of said election caused Deputy United States marshals to be and remain at the polling places in the city of Louisville, and in various other cities of the Commonwealth, intermeddling with the said election, overawing, threatening and intimidating Democratic voters and their friends and supporters of the Contestant, whereby many voters, to wit, more than enough to have changed the result of said election, were prevented from voting for Contestant, who otherwise would have done so.

Eighth. The Contestant says that after said election and before the meeting of the State Board of Election Commissioners, in the city of Frankfort, a conspiracy was formed and entered into by the Contestee, the Louisville and Nashville Railroad Company, John Whallen, who was its paid agent, and other persons whose names are unknown to Contestant, to bring from

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stated the said Taylor was, on November 7, 1899, duly elected Governor of the State of Kentucky, and the said Marshall duly elected Lieutenant Governor for the State of Kentucky by the qualified voters thereof; that each of them afterwards received

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various sections of this Commonwealth large numbers of desperate armed men, for the purpose of alarming and intimidating the members of the said Election Board in the discharge of their duties, and the friends and supporters of said Contestant; and that in pursuance to said conspiracy the corporations and persons aforesaid, did transport to the City of Frankfort at said time, a large number of the militia of the State, dressed in citizens' clothing, and many hundreds of desperate armed men, and unlawfully kept and maintained said militia and armed men in and about the chamber and Capitol where said Election Board held its sessions for several days; for the unlawful purpose of alarming and intimidating the members of said Board and the good citizens of the Commonwealth; and the said corporation and persons also caused the military forces of the Commonwealth to be armed and equipped and held in readiness and the state arsenal to be guarded by armed men for the unlawful purpose aforesaid, and Democratic members of the military companies of the state militia to be disarmed and discharged and their places to be filled with Republicans.

Ninth. The Contestant for further grounds of contest herein says that, in the County of Jefferson, the County Board of Election officers, whose duty it was to ascertain and correctly certify the result of said election held in said County, were compelled by threats of violence and death to the two Democratic members of said Board to accept, and said Board by reason of the duress aforesaid, did accept, false, fraudulent and illegal returns from the various precincts in the City of Louisville, which returns were prepared by the attorneys and agents of the Republican party and were signed by the precinct officers aforesaid under duress and threats of fine and imprisonment, and said Board of Election officers, by reason of the duress aforesaid, based upon their certificate as to the result of said election in said county upon the said false, fraudulent and illegal returns made by the said precinct officers as aforesaid, and for this cause the Contestant was deprived of many thousand votes cast for him at said election and the Contestee was given many thousand illegal votes to which he was not entitled, to wit, more than enough to have changed the result of the said election, and for this cause the said election was and is void and the alleged vote of Jefferson County as certified by said County Board should not be counted in ascertaining the result of said election in this Commonwealth.

Tenth. The Contestant further avers that many thousand of persons, who were not entitled to vote at the said election, on November 7, 1899, were unlawfully brought into this Commonwealth by the agents of the Louisville and Nashville Railroad Company and others acting in Contestee's behalf, and at said election were wrongfully and unlawfully voted for the

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in due form a certificate to that effect from the State Board of Election Commissioners of the Commonwealth of Kentucky, and each of them thereafter duly qualified as such officers by taking the oath of office prescribed by law therefor, and thereby each of them became charged with an express public trust for the benefit of the people of the State of Kentucky. They say that the proceedings referred to in the petition herein by which it is alleged that the contests over the offices of Governor and Lieutenant Governor were tried and determined, and by which it is alleged that the authority of these defendants to act respectively as Governor and Lieutenant Governor was terminated, were and are utterly void, and of no effect for the reasons hereinafter stated, and if effect be given to them, and these defendants be thereby deprived of their respective offices of Governor and Lieutenant Governor of Kentucky, and plaintiff, Beckham, be thereby installed in the office of Governor or Lieutenant Governor of Kentucky, these defendants will be thereby deprived by the State of Kentucky of their property without due process of law and both they and the people of Kentucky, and the qualified voters thereof will be deprived of their liberty without due process of law, and will be denied the benefit of a republican form of government, all of which is contrary to the provisions of the fourth section of the fourth article of the said Constitution and to the Fourteenth Amendment to said Constitution, the benefits of which provisions are hereby specially set up and claimed by these defendants both for themselves and for the people of Kentucky, and the qualified voters thereof, whose representatives and trustees these defendants are."

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"Defendants further say that, if the State, after having furnished to its citizens and electors in a number of its counties official ballots upon which it required them to vote, or not vote

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Contestee in said election; that the number of votes so cast were sufficient to have changed the result of said election.

The Contestant will, upon the grounds aforesaid, at the time and place and before the tribunals stated, contest the election of said William S. Taylor to the office of Governor of this Commonwealth."

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at all, in the election of a Governor and Lieutenant Governor, shall reject their votes, and thus refuse to allow used them to participate in the election of such officers, merely because they in voting the ballots which the State required them to use, and if the State shall, thereby and on that account, refuse to allow the persons respectively chosen for the office of Governor and Lieutenant Governor by the majority of the qualified voters of the State, including those using the ballots aforesaid, to take their seats and perform the duties of Governor and Lieutenant Governor, and shall in lieu of them seat other persons, then the State will thereby deprive the said citizens and electors, all of whom are both citizens of Kentucky and citizens of the United States, of their political liberty without due process of law, in violation of the Constitution of the United States, and will thereby deny to them the benefits of a republican form of government in violation of the Constitution of the United States; and will thereby also deprive these defendants of their property without due process of law, all of which is contrary to the provisions of the Constitution of the United States."

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"And defendants further say that if any such pretended meeting of members of the General Assembly was held either on January 31 or February 2, at which any action was taken or attempted to be taken on the reports of said Contest Committees, the said meetings were held secretly, without any notice to any of the Republican members of the General Assembly and without any notice to either of these defendants that such meetings were to be held, and without any opportunity either to the said Republican members or any of them to be present, or any opportunity for either of these defendants to be present at such meetings at which the said contests were to be heard and determined. And if any such meetings were held or attempted to be held on either of those days, and any determination of either of said contests was pretended to have been had, it was utterly void on account of lack of notice, and opportunity to be present or to be heard as just herein stated, as well as for the other reasons heretofore given. And to deprive these defendants or either of them of their offices by such action would

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be to deprive them of their property without due process of law, and would be to deprive defendants and the other people of the State of Kentucky, and especially the qualified voters thereof, of their political liberty without due process of law, and to deny to them the benefits of a republican form of government. All of which is contrary to the provisions and guaranties of the Constitution of the United States as well as that of Kentucky."

* * * * * * * *

"Defendants further say that both the offices of Governor and Lieutenant Governor are offices created by the constitution of Kentucky, and, therefore, not subject to abolition by the General Assembly of Kentucky. And, furthermore, it is provided by the constitution of Kentucky, that 'the salaries of public officers shall not be changed during the term for which they were elected,' and defendants say they were elected as heretofore shown to the offices of Governor and Lieutenant Governor, respectively, of the State of Kentucky on November 7, 1899, for a period of four years each, and then and thereby became entitled to exercise the functions of said offices and to receive the salaries and emoluments appertaining thereto, which are large and valuable, and were such when they were thus elected; the salary of the Governor being then and now fixed by law at $6500 per annum; and to take from them their said offices and their said salaries and emoluments by the aforesaid action of said contest tribunals would be to deprive them of their property without due process of law, contrary to the provisions of the Constitution of the United States, and especially of the Fourteenth Amendment thereof."

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"Defendants say that the power vested in the Houses of the General Assembly of Kentucky to try contests over elections of Governor or Lieutenant Governor is judicial in its nature, and is subject to the same limitations and restrictions to which the exercise of judicial power is ordinarily subject; that by the constitution of the State of Kentucky and also by the Constitution of the United States, especially the Fifth and Fourteenth Amendments thereof, the exercise of absolute and arbitrary

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power by the State or any department thereof, whereby any person shall be deprived of life, liberty, property or the pursuit of happiness, including therein the enjoyment of honors and the occupation of positions of public trust and emolument, is forbidden. But defendants say that if effect be given to the alleged decisions by the said Boards of Contest or the said Houses of the General Assembly as to the said contested elections for Governor or Lieutenant Governor; and these defendants be thereby deprived of the offices of Governor or Lieutenant Governor, and the plaintiff Beckham be thereby vested with the power of Governor of Kentucky, then not only will the people of Kentucky be deprived of their political liberty without due process of law, but these defendants will also be deprived without due process of law of the right to hold the said offices of Governor and Lieutenant Governor, which are both profitable and honorable, all of which is contrary to and forbidden by both the provisions of the state constitution and of the Constitution of the United States above referred to, and defendants say that if by a proper construction of the constitution of Kentucky the absolute and arbitrary power is given either to the Boards of Contest or the Houses of the General Assembly to take from these defendants the offices of honor, trust and emolument to which they were elected by the people of the State as heretofore alleged, under the false guise of a trial of a contest over said offices, then the said Constitution of the State is itself contrary to the aforesaid provisions of the Constitution of the United States."

The prayer of the defendants was that the bill be dismissed; that J. C. W. Beckham be adjudged a usurper, and that William S. Taylor and John Marshall be, respectively, adjudged the Governor and Lieutenant Governor of the Commonwealth.

The answers were in large part disposed of on demurrer and motion to strike out, and the case was submitted to the Circuit Court for determination on the law and facts without the intervention of a jury, and defendants "moved the court to state in writing the conclusions of fact found separately from the conclusions of law;" but it was agreed that the court might adopt its opinion on demurrer as its statement of its conclusions

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of law. This the court did, and found the facts in its judgment, which findings included, among others, these:

"Second. William Goebel and J. C. W. Beckham inaugurated a contest for the offices of Governor and Lieutenant Governor respectively before the General Assembly of Kentucky on the second day of January, 1900, against William S. Taylor and John Marshall, and the said contest was finally determined by the General Assembly on the second day of February, 1900, at which time it was adjudged and determined by each House of said General Assembly, acting separately and also in joint session, that the said William Goebel was duly elected Governor of the Commonwealth of Kentucky for the term beginning December 13, 1899, and was entitled to said office of Governor, and it was then and there in like manner determined by said General Assembly and by each House acting separately and in joint session that the said J. C. W. Beckham was duly elected Lieutenant Governor of said Commonwealth for the same term.

"Third. Immediately after the said determination the oath of office of Governor as provided by law was administered to said Goebel, February 2, 1900, and the oath of office as Lieutenant Governor, as provided by law, was in like manner administered to J. C. W. Beckham.

"Fourth. Said William Goebel died on the third day of February, at 6:45 P.M., and shortly thereafter upon said day J. C. W. Beckham as Lieutenant Governor was sworn, as required by law, to discharge the duties of the office of Governor of the Commonwealth."

Judgment of ouster was rendered in favor of plaintiff and against defendants.

The case was then carried on appeal to the Court of Appeals of Kentucky and the judgment affirmed, 56 S. W. Rep. 177, whereupon a writ of error from this court was allowed by the Chief Justice of that court.

The Journals of the two Houses, attached to the petition as part thereof, showed that the General Assembly convened on January 2, 1900, and that on the third day after its organization Boards of Contest were appointed pursuant to the statute; that on February 2, 1900, the Board in each of the contests re-

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ported to the two Houses that they had heard all the evidence offered by the parties, and that William Goebel had received the highest number of legal votes cast for Governor; that J. C. W. Beckham had received the highest number of legal votes cast for Lieutenant Governor; and that they were duly elected and entitled to those offices. The Journals further showed that on the same day both Houses, with a quorum present, approved and adopted, separately, and in joint session, the reports of the Contest Boards, and declared that William Goebel and J. C. W. Beckham were duly elected Governor and Lieutenant Governor respectively.

It appeared that thereupon said Goebel and Beckham on that day, February 2, took the oath of office; that on January 30 William Goebel was shot by an assassin, receiving a wound from which he afterward died on February 3; and that on January 31 defendant Taylor as Governor issued a proclamation, declaring that a state of insurrection existed at Frankfort, Kentucky, adjourning the General Assembly until February 6, and ordering it then to assemble at the town of London, in Laurel County.

The sessions of the General Assembly on February 2 were not held at the State House, for the reason, as recited in the journals, that it was occupied by a military force, which would not allow the General Assembly to meet there, and thereupon the General Assembly met on that day in the Capitol Hotel in the city of Frankfort. On February 19 the General Assembly met at the State House, and the Senate on that day adopted the following resolution:

"Whereas, on the 31st day of January, 1900, the acting Governor of the Commonwealth of Kentucky, by the use of armed force, dispersed the General Assembly, and has until recently prevented the Senate and House from assembling at their regular rooms and places of meeting; and,

"Whereas, the General Assembly and each House thereof, after public notice, met in joint and separate sessions in the city ot Frankfort, a full quorum of such bodies being present, and adopted the majority reports and resolutions of the Boards of Contest for Governor and Lieutenant Governor of the Common-

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wealth of Kentucky, unseating the contestees, W. S. Taylor and John Marshall, as Governor and Lieutenant Governor, and seating the contestants, William Goebel and J. C. W. Beckham, as Governor and Lieutenant Governor, respectively, all of which proceedings, reports and resolutions are set out in the Journals of the two Houses of the General Assembly; and,

"Whereas, this joint assembly is now enabled to meet in its regular place of meeting, and, whilst it adheres to the belief beyond doubt that the action of the General Assembly heretofore taken in reference to said contests is valid, final and conclusive, to remove any doubt that may exist in the minds of any of the people of the Commonwealth; now, be it

"*Resolved*, By the General Assembly of the Commonwealth of Kentucky, in joint session assembled, to the end that all doubt may be removed, if any exists, as to the validity and regularity of the action and proceedings at the times and places shown by the Journals of the two Houses, other than its regular rooms, provided by law, that all the acts, proceedings and resolutions of the Senate and House and of the joint assembly of the two Houses upon or touching the report of the majority of the Boards of Contest for the offices of Governor and Lieutenant Governor, unseating the contestees and seating William Goebel and J. C. W. Beckham, and declaring them to have been elected Governor and Lieutenant Governor, respectively, on the 7th day of November, 1899, is hereby reënacted, readopted and reaffirmed and ratified at this, the regular place of meeting provided by law, at the seat of government in Frankfort, Ky."

The same resolution was adopted by the House, and on February 20 by both Houses in joint session.

The Court of Appeals regarded the disposal of the following contentions of Taylor and Marshall as decisive of the case, namely: (1.) That the proceedings of the Legislature of February 2 were void, because the Legislature had then been adjourned by the Governor until February 6, and no legal session could be held in the meantime. (2.) That William Goebel having died on February 3, the contest for the office of Governor thereby abated, and the action of the Legislature on February 19 and 20 was therefore void. (3.) That the Legislature

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took no action on February 2, and that the Journals of these meetings were fraudulently made by the clerk in pursuance of an alleged conspiracy between certain members of the Assembly and contestants. (4.) That the General Assembly acted without evidence and arbitrarily.

The Court of Appeals held that the Governor had no power to adjourn the Legislature, and that his attempt to do so was wholly void, and did not interfere with the right of the Legislature to proceed with its sessions at Frankfort. The only authority relied on to sustain his action was section 36 of the constitution of Kentucky, as follows: "The first General Assembly, the members of which shall be elected under this constitution, shall meet on the first Tuesday after the first Monday in January, eighteen hundred and ninety-four, and thereafter the General Assembly shall meet on the same day every second year, and its sessions shall be held at the seat of government, except in case of war, insurrection or pestilence, when it may, by proclamation of the Governor, assemble, for the time being, elsewhere."

This the court held did not provide for the adjournment of the General Assembly by the Governor after it had assembled, but for the designation of another place at which it might assemble for the time being and organize, when prevented by the causes named from doing so at the capital; and that it was not intended to authorize such action as was taken was clear from section 80, which provided among other things: "In case of disagreement between the two Houses with respect to the time of adjournment, he (the Governor) may adjourn them to such time as he may think proper, not exceeding four months." This showed that the Governor had no power over the time of adjournment of the two Houses, except in cases of disagreement as to that matter between them, and no such disagreement existed here. And even then it did not confer upon him power to name any other place than that in which the legislature might be sitting.

Section 41 also provided: "Neither House, during the session of the General Assembly, shall, without the consent of the other, adjourn for more than three days, nor to any other place

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than that in which it may be sitting." By this section either House might, with the consent of the other, adjourn for more than three days, or to any other place than that in which it was sitting; but it could not have been intended that the Governor should have like power. On the contrary, the powers of the state government were divided into three distinct and independent departments, and the State constitution was intended to maintain the absolute independence of each.

The court further decided that the death of William Goebel on February third did not affect the right of Beckham. If Goebel was elected Governor, and Beckham, Lieutenant Governor, Beckham on February third became entitled to the office of Governor, and had the right to continue the contest to secure what the Constitution guaranteed him, so that if the legislature had not acted until February 19, it had a right then to act on the contest, and its action would be none the less valid because not taken in Goebel's lifetime.

As to the validity of the entries in the Journals and the effect to be given them, the court ruled, citing many authorities,[1] that evidence *aliunde* could not be received to impeach the validity of the record prescribed by the constitution as evidence of the proceedings of the General Assembly, and that the court was without jurisdiction to go behind the record thereby made. Among other things the court said (page 181):

"There is no conflict between the action of the state Canvassing Board and that of the Legislature in these cases. The state Canvassing Board were without power to go behind the returns. They were not authorized to hear evidence and determine who was in truth elected, but were required to give a certificate of election to those who on the face of the returns had received the highest number of votes. For the state Board to have received evidence to impeach the returns before them

[1] Cooley on Const. Lim. (5th ed.) 222; *Wright* v. *Defrees*, 8 Ind. 298; *McCulloch* v. *State*, 11 Ind. 424; *State* v. *Moffitt*, 5 Ohio, 358; *Wise* v. *Bigger*, 79 Va. 269; *Sunbury & Erie Railroad Co.* v. *Cooper*, 33 Pa. St. 278; *Fletcher* v. *Peck*, 6 Cranch, 87; *Ex parte McCardle*, 7 Wall. 506; *United States* v. *Des Moines Co.*, 142 U. S. 510, 544; *United States* v. *Old Settlers*, 148 U. S. 427, 466.

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would have been for them, in effect, to act as a Board for trying a contested election, and if they had done this, they would have usurped the power vested in the General Assembly by the constitution; for by its express terms only the General Assembly can determine a contested election for Governor and Lieutenant Governor.

"But the certificate of the State Board of Canvassers is no evidence as to who was in truth elected. Their certificate entitles the recipient to exercise the office until the regular constitutional authority shall determine who is the *de jure* officer. The rights of the *de jure* officer attached when he was elected, although the result was unknown until it was declared by the proper constitutional authority. When it was so declared, it was simply the ascertainment of a fact hitherto in doubt, or unsettled. The rights of the *de facto* officer, under his certificate from the Canvassing Board, were provisional or temporary until the determination of the result of the election as provided in the constitution; and upon that determination, if adverse to him, they ceased altogether. Such a determination of the result of the election, by the proper tribunal, did not take from him any preëxisting right; for, if not in fact elected, he had only a right to act until the result of the election could be determined."

In respect of the allegation that the action of the General Assembly was void because without evidence and arbitrary, the court held that it must be presumed that the Legislature did its duty in the premises; and further that the objections that the notices of contest were insufficient and that the evidence was equally insufficient; that the Contest Boards were not fairly drawn by lot, and that certain members of the Boards were liable to objection on the ground of partiality, were all in respect of matters confided to the General Assembly to deal with as made by the constitution the sole tribunal to determine such contests.

To the argument that if all the specifications of contestants were true, the election was wholly void, and no one elected, the court replied that it had no means of knowing the grounds on which the General Assembly reached its conclusion; that the

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presumptions were in favor of their judgment, and that "when they found as a fact that the contestants received the highest number of legal votes cast in the election in controversy, we are not at liberty to go behind their findings."

The court further held that the proceedings were not in violation of the Fourteenth Amendment, and said:

"The office of Governor being created by the constitution of this State, the instrument creating it might properly provide how the officer was to be elected and how the result of this election should be determined. The provisions of the constitution on this subject do not abridge the privileges or immunities of citizens of the United States. Such an office is not property, and in determining merely the result of the election, according to its own laws, the State deprives no one of life, liberty or property. In creating this office, the State had a right to provide such agencies as it saw fit to determine the result of the election, and it had a right to provide such a mode of procedure as it saw fit. It is wholly a matter of state policy. The people of the State might, by an amendment to their constitution, abolish the office altogether. The determination of the result of an election is purely a political question, and if such suits as this may be maintained, the greatest disorder will result in the public business. It has always been the policy of our law to provide a summary process for the settlement of such contests, to the end that public business shall not be interrupted; but if such a suit as this may be maintained, where will such a contest end?"

Of the seven members of the tribunal, Hazelrigg, C. J., Paynter, Hobson and White, JJ., concurred in the principal opinion by Hobson, J.; and Burnam and Guffy, JJ., in the result, in a separate opinion by Burnam, J., on the ground "that there is no power in the courts of the State to review the finding of the General Assembly in a contested election for the offices of Governor and Lieutenant Governor as shown by its duly authenticated records." Du Relle, J., dissented, holding that the Boards of Contest had no jurisdiction in the matter which they undertook to try, and that the demurrer should have been carried back to the petition and sustained.

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Statement of the Case.

The present constitution of the State of Kentucky, of 1891, provides, § 90: "Contested elections for Governor and Lieutenant Governor shall be determined by both Houses of the General Assembly, according to such regulations as may be established by law." This was taken verbatim from the twenty-fourth section of article three of the constitution of 1850.

Section 27 of article III of the constitution of 1799 provided: "Contested elections for a Governor and Lieutenant Governor shall be determined by a committee, to be selected from both Houses of the General Assembly, and formed and regulated in such manner as shall be directed by law."

The statutes of Kentucky provide:

"§ 1535. No application to contest the election of an officer shall be heard, unless notice thereof in writing signed by the party contesting, is given.

"1. The notice shall state the grounds of the contest, and none other shall afterward be heard as coming from such party; but the contestee may make defence without giving counter notice.

"2. In the case of an officer elective by the voters of the whole State, or any judicial district, the notice must be given within thirty days after the final action of the Board of Canvassers."

* * * * * * * *

"§ 1596 A, . . .

"8. Contested Election of Governor and Lieutenant Governor. When the election of a Governor or Lieutenant Governor is contested, a Board for determining the contest shall be formed in the manner following:

"First. On the third day after the organization of the General Assembly which meets next after the election, the Senate shall select, by lot, three of its members, and the House of Representatives shall select, by lot, eight of its members, and the eleven so selected shall constitute a Board, seven of whom shall have power to act.

"Second. In making the selection by lot, the name of each member present shall be written on a separate piece of paper, every such piece being as nearly similar to the other as may be.

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Each piece shall be rolled up so that the name thereon cannot be seen, nor any particular piece be ascertained or selected by feeling. The whole so prepared shall be placed by the clerk in a box on his table, and after it has been well shaken up and the papers therein well intermixed, the clerk shall draw out one paper, which shall be opened and read aloud by the presiding officer, and so on until the required number is obtained. The persons whose names are so drawn shall be members of the Board.

"Third. The members of the Board so chosen by the two Houses shall be sworn by the Speaker of the House of Representatives to try the contested election, and give true judgment thereon, according to the evidence, unless dissolved before rendering judgment.

"Fourth. The Board shall, within twenty-four hours after its election, meet, appoint its chairman and assign a day for hearing the contest, and adjourn from day to day as its business may require.

"Fifth. If any person so selected shall swear that he cannot, without great personal inconvenience, serve on the Board, or that he feels an undue bias for or against either of the parties, he may be excused by the House from which he was chosen from serving on the Board, and if it appears that the person so selected is related to either party, or is liable to any other proper objection on the score of its partiality, he shall be excused.

"Sixth. Any deficiency in the proper number so created shall be supplied by another draw from the box.

"Seventh. The Board shall have power to send for persons, papers and records, to issue attachments therefor signed by its chairman or clerk, and issue commissions for taking proof.

"Eighth. Where it shall appear that the candidates receiving the highest number of votes given have received an equal number, the right to the office shall be determined by lot, under the direction of the Board. Where the person returned is found not to have been legally qualified to receive the office at the time of his election, a new election shall be ordered to fill the vacancy; *Provided*, the first two years of his term shall not have expired. Where another than the person returned shall be found to have received the highest number of legal votes given,

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such other shall be adjudged to be the person elected and entitled to the office.

"Ninth. No decision shall be made but by the vote of six members. The decision of the Board shall not be final nor conclusive. Such decision shall be reported to the two Houses of the General Assembly, for the future action of the General Assembly. And the General Assembly shall then determine such contest.

"Tenth. If a new election is required it shall be immediately ordered by proclamation of the Speaker of the House of Representatives to take place within six weeks thereafter, and on a day not sooner than thirty days thereafter.

"Eleventh. When a new election is ordered or the incumbent adjudged not to be entitled, his powers shall immediately cease, and, if the office is not adjudged to another it shall be deemed to be vacant.

"Twelfth. If any member of the Board wilfully fails to attend its sessions, he shall be reported to the House to which he belongs, and thereupon such House shall, in its discretion, punish him by fine or imprisonment or both.

"Thirteenth. If no decision of the Board is given during the then session of the General Assembly, it shall be dissolved unless by joint resolution of the two Houses, it is empowered to continue longer."

Mr. Helm Bruce and *Mr. W. O. Bradley* for plaintiffs in error. *Mr. James P. Helm* and *Mr. Kennedy Helm* were on the brief.

Mr. Lawrence Maxwell, Jr., and *Mr. Lewis McQuown*, for defendant in error. *Mr. W. S. Pryor* was on their brief.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers, the tenure of their offices,

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the manner of their election, and the grounds on which, the tribunals before which, and the mode in which, such elections may be contested, should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.

And where controversies over the election of state officers have reached the state courts in the manner provided by, and been there determined in accordance with, the state constitutions and laws, the cases must necessarily be rare in which the interference of this court can properly be invoked.

In *Boyd* v. *Thayer*, 143 U. S. 135, which was a proceeding *quo warranto*, in which the Supreme Court of Nebraska had held that James E. Boyd had not been for two years preceding his election a citizen of the United States, and hence that under the constitution of the State he was not eligible to the office of Governor, this court took jurisdiction because the conclusion of the state court involved the denial of a right or privilege under the Constitution and laws of the United States, upon which the determination of whether Boyd was a citizen of the United States or not depended, and therefore jurisdiction to review a decision against such right or privilege necessarily existed in this tribunal. *Missouri* v. *Andriano*, 138 U. S. 496. And we said (p. 161): "Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen, and the title to offices shall be tried, whether in the judicial courts or otherwise. But when the trial is in the courts, it is a 'case,' and if a defence is interposed under the Constitution or laws of the United States, and is overruled, then, as in any other case decided by the highest court of a State, this court has jurisdiction by writ of error."

So in *Kennard* v. *Louisiana*, 92 U. S. 480, concerning the right of Kennard to the office of associate justice of the Supreme Court of Louisiana, jurisdiction was taken on the ground that the constitutionality of the statute under which the disputed title to office was tried was drawn in question. The court, speaking by Mr. Chief Justice Waite, said: "The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether

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the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the state courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all."

The writ in *Foster* v. *Kansas*, 112 U. S. 201, rested on the same ground.

In each of the foregoing cases, the determination of the right to the offices in dispute was reposed in the judicial courts, and no question was expressly considered by this court as to whether the right to a public office of a State was or was not protected by the Fourteenth Amendment.

In *Wilson* v. *North Carolina*, 169 U. S. 586, 592, the Governor of North Carolina had suspended plaintiff in error as Railroad Commissioner under a statute of that State, and the state Supreme Court had held the action of the Governor a valid exercise of the power conferred upon him, and that it was due process of law within the meaning of the Constitution. A writ of error from this court to review that judgment was granted, and on hearing was dismissed. Mr. Justice Peckham, in delivering the opinion, said: "The controversy relates exclusively to the title to a state office, created by a statute of the State, and to the rights of one who was elected to the office so created. Those rights are to be measured by the statute and by the constitution of the State, excepting in so far as they may be protected by any provision of the Federal Constitution. Authorities are not required to support the general proposition that in the consideration of the constitution or laws of a State this court follows the construction given to those instruments by the highest court of the State. The exceptions to this rule do not embrace the case now before us. We are, therefore, concluded by the decision of the Supreme Court of North Carolina as to the proper construction of the statute itself, and that as construed it does not violate the constitution of the State. The only question for us to review is whether the State, through the action of its Governor and judiciary, has deprived the plaintiff in error of his property without due process of law, or denied to him the equal protection of the laws. We are of opinion

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that the plaintiff in error was not deprived of any right guaranteed to him by the Federal Constitution, by reason of the proceedings before the Governor under the statute above mentioned, and resulting in his suspension from office. The procedure was in accordance with the constitution and laws of the State. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held. What kind and how much of a hearing the officer should have before suspension by the Governor was a matter for the state Legislature to determine, having regard to the constitution of the State. The procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not in general involve any question for review by this court. A law of that kind does not provide for the carrying out and enforcement of the policy of the State with reference to its political and internal administration, and a decision of the state court in regard to its construction and validity will generally be conclusive here. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a Federal question. . . . In its internal administration the State (so far as concerns the Federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the persons filling the office. And in such matters the decision of the state court, that the procedure by which an officer has been suspended or removed from office was regular and was under a constitutional and valid statute, must generally be conclusive in this court. . . . Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws."

The grounds on which our jurisdiction is sought to be maintained in the present case are set forth in the errors assigned, to the effect in substance: (1) That the action of the General Assembly in the matter of these contests deprived plaintiffs in

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error of their offices without due process of law. (2) That the action of the General Assembly deprived the people of Kentucky of the right to choose their own representatives, secured by the guarantee of the Federal Constitution of a republican form of government to every State; and deprived them of their political liberty without due process of law.

For more than a hundred years the constitution of Kentucky has provided that contested elections for Governor and Lieutenant Governor shall be determined by the General Assembly. In 1799, by a committee, "to be selected from both houses of the General Assembly, and formed and regulated in such manner as shall be directed by law;" since 1850, "by both houses of the General Assembly, according to such regulations as may be established by law."

The highest court of the State has often held and, in the present case has again declared, that under these constitutional provisions the power of the General Assembly to determine the result is exclusive, and that its decision is not open to judicial review. *Batman* v. *Megowan*, 1 Metc. (Ky.) 533; *Stine* v. *Berry*, 96 Ky. 63.[1]

The statute enacted for the purpose of carrying the provisions of the constitution into effect has been in existence in substance since 1799. 1 Morehead and Brown, 593–4; Rev. Stat. Ky. 1852, chap. 32, art. 7, § 1, p. 294. Many of the States have similar constitutional provisions and similar statutes.

We do not understand this statute to be assailed as in any manner obnoxious to constitutional objection, but that plaintiffs in error complain of the action of the General Assembly under the statute, and of the judgment of the state courts declining to disturb that action.

It was earnestly pressed at the bar that all the proceedings were void for want of jurisdiction apparent on the face of the record; that under the constitution and statute, as there was no question of an equal number of votes, or of the legal qualifi-

[1] And see *State* v. *Marlow*, 15 Ohio St. 114, 134; *State* v. *Harmon*, 31 Ohio St. 250; *Commonwealth* v. *Garrigues*, 28 Pa. St. 9; *Commonwealth* v. *Leach*, 44 Pa. St. 332; *Royce* v. *Goodwin*, 22 Mich. 496; *Baxter* v. *Brooks*, 29 Ark. 173; *State* v. *Lewis*, 51 Conn. 113.

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cations of the candidates, the action of the General Assembly could only be invoked by a contest as to which of the parties had received the highest number of legal votes, but that the notices put forward a case, not of the election of the contestants, but of no election at all, which the Contest Boards and the General Assembly had no jurisdiction to deal with. The notices were, however, exceedingly broad, and set up a variety of grounds, and specifically stated that the contestants would ask the Boards of Contest and the General Assembly to determine that they were legally and rightfully elected Governor and Lieutenant Governor at the said election and that the contestees were not. And the determination of the Boards and of the General Assembly was that contestants had received the highest number of legal votes cast for any candidate for said offices at said election, and were duly and legally elected Governor and Lieutenant Governor, a determination which adjudged the notices to be sufficient, and which did not include any matter not within the jurisdiction of the tribunal.

We repeat, then, that the contention is that, although the statute furnished due process of law, the General Assembly in administering the statute denied it; and that the Court of Appeals in holding to the rule that where a mode of contesting elections is specifically provided by the constitution or laws of a State, that mode is exclusive, and in holding that as the power to determine was vested in the General Assembly of Kentucky, the decision of that body was not subject to judicial revision, denied a right claimed under the Federal Constitution. The Court of Appeals did, indeed, adjudge that the case did not come within the Fourteenth Amendment, because the right to hold the office of Governor or Lieutenant Governor of Kentucky was not property in itself, and, being created by the state Constitution, was conferred and held solely in accordance with the terms of that instrument and laws passed pursuant thereto, so that, in respect of an elective office, a determination of the result of an election, in the manner provided, adverse to a claimant, could not be regarded as a deprivation forbidden by that amendment.

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The view that public office is not property has been generally entertained in this country.

In *Butler* v. *Pennsylvania*, 10 How. 402, 416, Butler and others by virtue of a statute of the State of Pennsylvania had been appointed Canal Commissioners for a term of one year with a compensation of four dollars per diem, but during their incumbency another statute was passed whereby the compensation was reduced to three dollars, and it was claimed that their contract rights were thereby infringed. The court drew a distinction between such a situation and that of a contract by which "perfect rights, certain definite, fixed private rights of property, are vested;" and said: "These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so too are the periods for the appointment of such agents; and neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. . . . It follows, then, upon principle, that, in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. It is true, that this power, or the extent of its exercise, may be controlled by the higher organic law or constitution of the State, as is the case in some instances in the state constitutions, . . ."

In *Crenshaw* v. *United States*, 134 U. S. 99, 104, Mr. Justice Lamar stated the primary question in the case to be: "Whether an officer appointed for a definite time or during good behavior had any vested interest or contract right in his office of

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which Congress could not deprive him." And he said, speaking for the court: "The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right." *Butler* v. *Pennsylvania, supra; Newton* v. *Commissioners*, 100 U. S. 548; *Blake* v. *United States*, 103 U. S. 227; and many other cases.

The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. Nor does the fact that a constitution may forbid the legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent change its character or make it property. True, the restrictions limit the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right.[1]

The Court of Appeals not only held that the office of Governor or of Lieutenant Governor was not property under the constitution of Kentucky; but moreover, that court was of opinion that the decision of these contested elections did not deprive plaintiffs in error of any preëxisting right.

Our system of elections was unknown to the common law, and the whole subject is regulated by constitutions and statutes passed thereunder. In the view of the Court of Appeals the mode of contesting elections was part of the machinery for ascertaining the result of the election, and hence, the rights of the officer who held the certificate of the State Board of Canvassers "were provisional or temporary until the determination of the result of the election as provided in the constitution,

[1] *Sweeny* v. *Poyntz*, Cir. Ct. U. S. Dist. Ky., not yet reported, Taft, J.; *Standeford* v. *Wingate*, 2 Duvall, (Ky.) 440, 443; *Conner* v. *Mayor*, 5 N. Y. 285; *Donahue* v. *Will County*, 100 Ill. 94; *Attorney General* v. *Jochim*, 99 Mich. 358; *Smith* v. *Mayor*, 37 N. Y. 518; *State* v. *Hawkins*, 44 Ohio St. 98; *State* v. *Davis*, 44 Mo. 129; *State* v. *Duvall*, 26 Wis. 415, 418; *Prince* v. *Skillen*, 71 Maine, 361; *Douglas Co.* v. *Timme*, 32 Neb. 272; *Lynch* v. *Chase*, 55 Kan. 367; *Shelby* v. *Alcorn*, 36 Miss. 273.

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and upon that determination, if adverse to him, they ceased altogether." In fact, the statute provided that when the "incumbent was adjudged not to be entitled, his powers shall immediately cease," and under the constitution the holder of the certificate manifestly held it for the time being subject to the issue of a contest if initiated.

It is clear that the judgment of the Court of Appeals in declining to go behind the decision of the tribunal vested by the state constitution and laws, with the ultimate determination of the right to these offices, denied no right secured by the Fourteenth Amendment.

But it is said that the Fourteenth Amendment must be read with section 4 of article IV of the Constitution, providing that: "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened,) against domestic violence." It is argued that when the State of Kentucky entered the Union, the people "surrendered their right of forcible revolution in state affairs," and received in lieu thereof a distinct pledge to the people of the State of the guarantee of a republican form of government, and of protection against invasion, and against domestic violence; that the distinguishing feature of that form of government is the right of the people to choose their own officers for governmental administration; that this was denied by the action of the General Assembly in this instance; and, in effect, that this court has jurisdiction to enforce that guarantee, albeit the judiciary of Kentucky was unable to do so because of the division of the powers of government. And yet the writ before us was granted under § 709 of the Revised Statutes to revise the judgment of the state court on the ground that a consitutional right was decided against by that court.

It was long ago settled that the enforcement of this guarantee belonged to the political department. *Luther* v. *Borden*, 7 How. 1. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a volun-

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tary convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it; and also that as the Supreme Court of Rhode Island holding constitutional authority not in dispute, had decided the point, the well settled rule applied that the courts of the United States adopt and follow the decisions of the state courts on question which concern merely the constitution and laws of the State.

We had occasion to refer to *Luther* v. *Borden* in *In re Duncan, Petitioner*, 139 U. S. 449, 461, and we there observed: "Mr. Webster's argument in that case took a wider sweep, and contained a masterly statement of the American system of government, as recognizing that the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the constitution of the government and in the enactment of laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms for the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes; and that the Constitution and laws do not proceed on the ground of revolution or any right of revolution, but on the idea of results achieved by orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our institutions. Webster's Works, vol. 6, p. 217. . . . The State of Texas is in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law. Whether certain statutes have or have not binding force, it is for the State to determine, and that deter-

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mination in itself involves no infraction of the Constitution of the United States, and raises no Federal question giving the courts of the United States jurisdiction."

These observations are applicable here. The Commonwealth of Kentucky is in full possession of its faculties as a member of the Union, and no exigency has arisen requiring the interference of the General Government to enforce the guarantees of the Constitution, or to repel invasion, or to put down domestic violence. In the eye of the Constitution, the legislative, executive and judicial departments of the State are peacefully operating by the orderly and settled methods prescribed by its fundamental law, notwithstanding there may be difficulties and disturbances arising from the pendency and determination of these contests. This very case shows that this is so, for those who assert that they were aggrieved by the action of the General Assembly, properly accepted the only appropriate remedy, which under the law was within the reach of the parties. That this proved ineffectual as to them, even though their grounds of complaint may have been in fact well founded, was the result of the constitution and laws under which they lived and by which they were bound. Any remedy beside that is to be found in the august tribunal of the people, which is continually sitting, and over whose judgments on the conduct of public functionaries the courts exercise no control.

We must decline to take jurisdiction on the ground of deprivation of rights embraced by the Fourteenth Amendment, without due process of law, or of the violation of the guarantee of a republican form of government by reason of similar deprivation.

As remarked by Chief Justice Taney in *Luther* v. *Borden*: "The high power has been conferred on this court of passing judgment upon the acts of the state sovereignties, and of the legislative and executive branches of the Federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided

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to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums."

Writ of error dismissed.

MR. JUSTICE MCKENNA concurred in the result.

MR. JUSTICE BREWER, with whom concurred MR. JUSTICE BROWN, dissenting.

I am unable to concur in all that is said by the Chief Justice in the opinion just announced, and will state briefly wherein I dissent.

An office to which a salary is attached, in a case in which the controversy is only as to which of two parties is entitled thereto, has been adjudged by this court, and rightfully, to be property within the scope of that clause of the Fourteenth Amendment, which forbids a state to "deprive any person of life, liberty or property without due process of law." In *Kennard* v. *Louisiana*, 92 U. S. 480, Kennard was appointed a justice of the Supreme Court of Louisiana. Morgan claimed to be entitled thereto, and brought suit to settle the title to the office. The Supreme Court of the State decided in favor of Morgan, and Kennard sued out a writ of error from this court on the ground that the judgment had deprived him of his office, without due process of law, in violation of the foregoing provision of the Fourteenth Amendment. Of course, neither life nor liberty were involved, and the jurisdiction of this court could be sustained only on the ground that the property of Kennard was taken from him, as alleged, without due process of law. This court unanimously sustained the jurisdiction, but on examination of the proceedings found that there had been due process of law, and therefore affirmed the judgment of the Supreme Court of Louisiana. In *Foster* v. *Kansas*, 112 U. S. 201, the Supreme Court of Kansas had, in *quo warranto* proceedings, ousted Foster from the office of county attorney of Saline County, and there was presented a motion to dismiss as well

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as one to affirm. This court unanimously held that the motion to dismiss must be overruled, saying (p. 206):

"As the question of the constitutionality of the statute was directly raised by the defendant, and decided against him by the court, we have jurisdiction, and the motion to dismiss must be overruled."

At the same time it affirmed the decision of the Supreme Court of the State on the ground that the proceedings showed due process of law. In *Boyd* v. *Thayer*, 143 U. S. 135, the Supreme Court of Nebraska had, in an appropriate action, rendered judgment ousting Boyd from the office of governor of the State, and placing Thayer in possession. On error to this court we took jurisdiction of the case, and reversed the judgment of the Supreme Court of Nebraska, thus restoring Boyd to the office from which he had been ousted by the judgment of that court. In that case there was a dissenting opinion by Mr. Justice Field on the ground of jurisdiction, he saying (p. 182):

"I dissent from the judgment just rendered. I do not think that this court has any jurisdiction to determine a disputed question as to the right to the governorship of a State, however that question may be decided by its authorities."

In the late case of *Wilson* v. *North Carolina*, 169 U. S. 586, in which the judgment of the Supreme Court of the State, confirming the action of governor, in suspending a railroad commissioner, was sustained, and the writ of error dismissed, the dismissal was not placed on the ground that the office, with its salary, was not property to be protected by the Fourteenth Amendment, but, as said Mr. Justice Peckham, speaking for the court (p. 595):

"Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law, or by denying him the equal protection of the laws."

We have thus, in four cases, coming at successive times through

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MR. JUSTICE BREWER and MR. JUSTICE BROWN, dissenting.

a period of twenty-five years, had before us the question of the validity of judgments of the highest courts of separate States, taking office from one person and giving it to another, in three of which we unhesitatingly sustained our jurisdiction to review such judgments, two of which we affirmed, on the ground that the proceedings in the state court disclosed due process of law, and that, therefore, the rights of the plaintiff in error were not infringed; in the third of which we held that the proceedings could not be sustained, and reversed the judgment of the state court, ousting one person from the high office of governor of the State and giving it to another; and in the fourth of which, while we dismissed the writ of error, it was not on the ground that there was no property involved, but because the reasons assigned for a review were so frivolous as not to call for consideration. Such a series of decisions should not now be disturbed, except upon very cogent and satisfactory reasons. And this case, it must be borne in mind, is exactly like the others, a proceeding in error to review the judgment of the highest court of a state in an action to remove an incumbent from his office.

Aside from these adjudications, I am clear, as a matter of principle, that an office to which a salary is attached is, as between two contestants for such office, to be considered a matter of property. I agree fully with those decisions which are referred to, and which hold that as between the State and the officeholder there is no contract right either to the term of office or the amount of salary, and that the legislature may, if not restrained by constitutional provisions, abolish the office or reduce the salary. But when the office is not disturbed, when the salary is not changed, and when, under the constitution of the State, neither can be by the legislature, and the question is simply whether one shall be deprived of that office and its salary, and both given to another, a very different question is presented, and in such a case to hold that the incumbent has no property in the office with its accompanying salary does not commend itself to my judgment.

While not concurring in the order of dismissal, I am of opinion that the judgment of the Court of Appeals of Kentucky should be affirmed. The State of Kentucky has provided that

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contests in respect to the office of governor and lieutenant governor shall be decided by the General Assembly. Such provision is not uncommon, is appropriate, and reasonable. The contestants, William Goebel and J. C. W. Beckham, filed with the General Assembly within due time their notices of contest. Those notices were broad enough to justify action by the General Assembly, and a decision setting aside the award of the canvassing board and giving to the contestants their offices. The prescribed procedure was followed, the committee authorized by statute was selected, its report made, and upon that a decision awarding to the contestants the offices. It is true that the first decision of the General Assembly was made at a secret session outside its ordinary place of meeting, and without notice except to those who were supposed to be willing to concur in the report of the committee. If that ended the proceedings I should be strongly inclined to hold that the decision thus rendered could not be sustained. For when a tribunal is constituted of several members I understand that all have a right to be present, and if any session is held elsewhere than at the appointed time and place each one must be notified in order that he may have the opportunity of being present, and contributing by his advice and opinion to the final judgment. But the record does not stop with this award of a part of the assembly in secret session, for subsequently, when the General Assembly was in session at its regular place of meeting, in the discharge of its ordinary duties, and at a time prescribed for its meeting, the action taken on February 2 was ratified and confirmed, both in single and joint session. Now, I agree with those members of the Court of Appeals of Kentucky who hold that this final action of the General Assembly is conclusive. I do not ignore the many allegations of wrong, such as that the selection of the committee was not by lot, as prescribed by the laws, but was a trick on the part of the clerks of the assembly, and it must be conceded that the outcome of that drawing lends support to this allegation. Curious results sometimes happen by chance, but when those results happen so largely along the lines of the purposes of those who have control of the supposed chance, it is not strange that outsiders are apt to feel that purpose, and not

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chance determined the result. Be all these things as they may, the General Assembly was constituted as the tribunal to conduct and supervise the contest. It approved what took place, and it is familiar law that no question can be raised in the courts as to the honesty or integrity of the members of the legislature in the discharge of their duties. Whatever of purity or honesty may be in fact lacking in the conduct of any one of them is a matter to be inquired into between his constituents and himself, and it is no part of the province of the judiciary to challenge or question the integrity of his action. So we have the case of a committee apparently selected by lot, the propriety of whose action was approved by the tribunal having charge of the controversy, the report of that committee in favor of the contestants, and the judgment of the assembly, not merely at the secret session, but later, when all were present, or were called upon to be present, approving such report. This in my opinion constitutes due process of law within the meaning of the Fourteenth Amendment, and I agree with the Court of Appeals of Kentucky that upon that award thus made by the proper tribunal, no other judgment can be entered than that which sustains it. But because, as I understand the law, this court has jurisdiction to review a judgment of the highest court of a State ousting one from his office, and giving it to another, a right to inquire whether that judgment is right or wrong in respect to any Federal question, such as due process of law, I think the writ of error should not be dismissed, but that the judgment of the Court of Appeals of Kentucky should be affirmed.

MR. JUSTICE HARLAN, dissenting:

At the regular election held in Kentucky on the 7th day of November, 1899, William S. Taylor and William Goebel were, respectively, the Republican and Democratic candidates for Governor of that Commonwealth.

As required by law, the returns of the election were made to the Secretary of State.

Upon examining and canvassing the returns, the officers charged with the duty of ascertaining the result of the election

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certified, as to the office of Governor, that Taylor "received the highest number of votes given for that office, as certified to the Secretary of State, and is, therefore, duly and regularly elected for the term prescribed by the Constitution." According to the returns upon which that certificate was based Taylor received 193,714 votes and Goebel 191,331.

It cannot be doubted that the certificate awarded to Taylor established at least his *prima facie* right to the Governorship, and that he could not be deprived of that right except upon a contest in the mode prescribed by law, and upon proof showing that Goebel was legally entitled to the office. To deprive him of that right illegally was an injury both to him and to the people of the State. "The very essence of civil liberty," it was said in *Marbury* v. *Madison*, 1 Cranch, 137, "is the right of every individual to claim the protection of the laws, whenever he receives an injury."

The Constitution of Kentucky provides that the Governor "shall be elected for the term of four years by the qualified voters of the State. The person having the highest number of votes shall be Governor; but if two or more shall be equal and highest in votes, the election shall be determined by lot, in such manner as the General Assembly may direct;" and that the Governor "shall at stated times receive for his services a compensation to be fixed by law." Const. Kentucky, §§ 70, 74. That instrument further provides that "contested elections for Governor and Lieutenant Governor shall be determined by both Houses of the General Assembly, according to such regulations as may be established by law." § 90.

Taylor, having received his certificate of election based upon the returns to the Secretary of State, took the oath of office as Governor on December 12, 1899 — the oath being administered by the Chief Justice of the Court of Appeals of Kentucky—and entered at once upon the discharge of his duties, taking possession of the public buildings provided for the Governor, as well as of the books, archives and papers committed by law to the custody of that officer. After that and until he was lawfully ousted, his acts, as Governor, in conformity to law, were binding upon every branch of the state government and upon the people.

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Within thirty days after the certificate of election was awarded to Taylor he was served by Goebel with notice of contest for the office of Governor.

By the statutes of Kentucky relating to contested elections for Governor and Lieutenant Governor it is provided:

"When the election of a Governor or Lieutenant Governor is contested a Board for determining the contest shall be formed in the manner following:

"First. On the third day after the organization of the General Assembly, which meets next after the election, the Senate shall select by lot three of its members, and the House of Representatives shall select by lot eight of its members, and the eleven so selected shall constitute a Board, seven of whom shall have power to act.

"Second. In making the selection by lot the name of each member shall be written on a separate piece of paper, every such piece being as nearly similar to the other as may be. Each piece shall be rolled up so that the name thereon cannot be seen, nor any particular piece be ascertained or selected by feeling. The whole so prepared shall be placed by the clerk in a box on his table, and, after it has been well shaken and the papers therein well intermixed, the clerk shall draw out one paper, which shall be opened and read aloud by the presiding officer, and so on until the required number is obtained. The persons whose names are so drawn shall be members of the Board.

"Third. The members of the Board so chosen by the two Houses shall be sworn by the Speaker of the House of Representatives to try the contested election, and give true judgment thereon, according to the evidence, unless dissolved before rendering judgment.

"Fourth. The board shall, within twenty-four hours after its election, meet, appoint its chairman and assign a day for hearing the contest, and adjourn from day to day as its business may require.

"Fifth. If any person so selected shall swear that he cannot, without great personal inconvenience, serve on the Board, or that he feels an undue bias for or against either of the parties,

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he may be excused by the House from which he was chosen from serving on the Board, and if it appears that the person so selected is related to either party, or is liable to any other proper objection on the score of his partiality, he shall be excused.

"Sixth. Any deficiency in the proper number so created shall be supplied by another draw from the box.

"Seventh. The Board shall have power to send for persons, papers and records, to issue attachments therefor, signed by its chairman or clerk, and issue commissions for taking proof.

"Eighth. Where it shall appear that the candidates receiving the highest number of votes given have received an equal number, the right to the office shall be determined by lot, under the direction of the Board. Where the person returned is found not to have been legally qualified to receive the office at the time of his election, a new election shall be ordered to fill the vacancy: *Provided*, The first two years of his term shall not have expired. Where another than the person returned shall be found to have received the highest number of legal votes given, such other shall be adjudged to be the person elected and entitled to the office.

"Ninth. No decision shall be made but by the vote of six members. The decision of the Board shall not be final nor conclusive. Such decision shall be reported to the two Houses of the General Assembly, for the future action of the General Assembly. And the General Assembly shall then determine such contest.

"Tenth. If a new election is required it shall be immediately ordered by proclamation of the Speaker of the House of Representatives, to take place within six weeks thereafter, and on a day not sooner than thirty days thereafter.

"Eleventh. When a new election is ordered or the incumbent adjudged not to be entitled, his powers shall immediately cease, and, if the office is not adjudged to another, it shall be deemed to be vacant.

"Twelfth. If any member of the Board wilfully fails to attend its sessions, he shall be reported to the House to which he belongs, and thereupon such House shall, in its discretion, punish him by fine and imprisonment, or both.

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MR. JUSTICE HARLAN, dissenting.

"Thirteenth. If no decision of the Board is given during the then session of the General Assembly, it shall be dissolved, unless by joint resolution of the two Houses it is empowered to continue longer." Rev. Stat. Kentucky, § 1596 *A*.

It may be here observed that the jurisdiction conferred by the statute upon the Board of Contest appointed by the Legislature is not without limit. The power given to determine contested elections for Governor and Lieutenant Governor is attended by the condition that the determination of the contest shall be according to such regulations as may be established by law. In words too clear to require construction the powers of a Board of Contest are restricted so that (1) if the votes were not accurately summed up, the error might be corrected; (2) if illegal votes were cast they might be thrown out; (3) in the event "the candidates receiving the highest number of votes given have received an equal number, the right to the office shall be determined by lot"; (4) if the person returned as elected was not legally qualified to receive the office at the election, a new election must be ordered to fill the vacancy; (5) if another than the person returned is found "to have received the highest number of legal votes *given*, such other shall be adjudged to be the person elected and entitled to the office." The statute has been so construed by the highest court of Kentucky in *Leeman* v. *Hinton*, 1 Duvall, 38. That was a common law action involving the title to an office. The defendant relied upon the decision of a Board of Contest to the effect that Leeman's claim to the office rested upon an election held in each precinct under the supervision of military officers who overawed the majority of the voters in the county. The Court of Appeals of Kentucky decided in favor of Leeman, saying: "But the authority to decide as to the freedom and equality of elections has not been conferred by the Legislature upon the Board for trying contested elections, but forms a part of the general jurisdiction of the court." In the previous case of *Newcum* v. *Kirtly*, 13 B. Mon. 522—which was a contested election case in which the Board assumed to count votes *not cast*, but which *would have been cast* if the polls had not been closed too soon—the court said that "the necessary and certain import of

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the provision is that the contestant shall not be adjudged to be entitled to the office unless the Board find that he has *received* the highest number of legal votes *given*."

Let it also be observed that the Board of Contest in this case was not given jurisdiction to throw out all the votes cast in a particular city, county or section of the State because, in its judgment, the freedom of the election in such city, county or section was destroyed by military or other interference. In other words, the Board was without jurisdiction to throw out legal votes actually given, and was bound to respect the mandate of the constitution that "the person *having* the highest number of votes *shall be* Governor," as well as the mandate of the statute that the person "found to have *received* the highest number of votes . . . *shall be* adjudged to be the person elected and entitled to the office."

I remark further that the members elected to try the contested election were required by the statute "to give true judgment *according to the evidence*."

As to the Legislature, it was made its duty by express words to determine the contest, without regarding the decision of the Board as final or conclusive. But as already suggested, its jurisdiction to act was not without limit; for, in addition to the restrictions above referred to, by the statute under which it proceeded no application to contest the election of an officer could be heard unless notice thereof in writing, signed by the party contesting, had been given; and "the notice shall state the grounds of the contest, and none other shall afterward be heard as coming from such party, but the contestee may make defence without giving counter notice." Rev. Stat. Kentucky, § 1535. The Board of Contest, as the court below has said, "was only a preliminary agent *to take evidence* and *report* the *facts* to the General Assembly. The Assembly itself finally determined the contest." As the General Assembly could determine the contest only upon the grounds set forth in the contestant's notice, it had no authority or jurisdiction to oust the incumbent unless those grounds or some of them were sustained by proof laid before it. If no proof was laid before it, then the *prima facie* right of the incumbent based upon the certificate awarded to him, must prevail.

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MR. JUSTICE HARLAN, dissenting.

With these preliminary observations as to the trial by a Board of Contest of a contested election for Governor, and as to the powers of the Legislature in determining such contest finally as between the parties, I come to the consideration of the grounds upon which the majority of the court have dismissed the present writ of error.

The Board of Contest in their report of January 30, 1900, say: "In our opinion William Goebel was elected Governor of the Commonwealth of Kentucky on the 7th day of November, 1899, and that he then and there received the highest number of legal votes cast for any one for the office of Governor at said election, and we therefore respectfully suggest that this report be approved, and a resolution adopted by the General Assembly declaring the said William Goebel Governor-elect of the Commonwealth of Kentucky for the term commencing the 12th day of December, 1899. We decide that said William Goebel has received the highest number of legal votes, and is adjudged to be the person elected to said office of Governor for the term prescribed by law."

The report was not accompanied either by any abstract of the evidence or any recital of the grounds upon which it based the statement that Goebel had received the highest number of legal votes. Nor was the evidence itself transmitted to the Legislature—not a line nor a word of it. According to the uncontradicted statement made by counsel at the argument, the proof made nearly two thousand pages of typewriting. The report simply followed the words of the statute and stated that Goebel had received "the highest number of legal votes," giving no basis, not the slightest, upon which the Legislature could determine the correctness of that statement.

Immediately after the Board's report reached the body claiming to be the lawful Legislature of the State, that body—of course without reading the evidence, or causing it to be read, for it had no evidence before it—approved the report, and declare Goebel to have been legally elected Governor. Upon that action alone the present suit was based, and by the judgment of the highest court of Kentucky such action was declared to be conclusive upon the judiciary.

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MR. JUSTICE HARLAN, dissenting.

The first question to be considered is whether Taylor has been denied by the judgment of the state court any right or privilege secured to him by the Constitution of the United States. The appellant invokes the clause of the Fourteenth Amendment declaring that "no State shall deprive any person of life, liberty or property, without due process of law." There ought not, at this day, to be any doubt as to the objects which were intended to be attained by the requirement of due process of law. "They were intended," this court has said, "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." *Bank* v. *Okely*, 4 Wheat. 244.

The majority of this court decide that an office held under the authority of a State cannot in any case be deemed property within the meaning of the Fourteenth Amendment, and hence, it is now adjudged, the action of a state Legislature or state tribunal depriving one of a state office—under whatever circumstances or by whatever mode that result is accomplished—cannot be regarded as inconsistent with the Constitution of the United States. Upon that ground the court declines to take jurisdiction of this writ of error. If the court had dismissed the writ or affirmed the judgment upon the ground that there had been no violation of the principles constituting due process of law, its action would not have been followed by the evil results which, I think, must inevitably follow from the decision now rendered.

Let us see whether, in dismissing the writ of error for want of jurisdiction, the majority have not departed from the rulings of this court in former cases. This question, it cannot be doubted, is one of serious moment. But what was said by Chief Justice Marshall, speaking for this court in *Cohens* v. *Virginia*, 6 Wheat. 404, may well be repeated: "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We may not pass it by because it is doubtful. With whatever

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doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction if it is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them."

The first case in this court relating to this subject is *Kennard* v. *Louisiana*, 92 U. S. 480. That was a writ of error brought by Kennard to review the final judgment of the Supreme Court of Louisiana declaring that he was not a member of that court. "The case," the report states, "was then brought here *upon the ground* that the State of Louisiana acting under the law, through her judiciary, had deprived Kennard of his office without due process of law, in violation of that provision of the Fourteenth Amendment of the Constitution of the United States which prohibits any State from depriving any person of life, liberty or property, without due process of law." Looking also into the printed arguments filed in that case, on behalf of the respective parties, I find that the attorney for the plaintiff in error, a lawyer of distinction, insisted that the *sole* question presented for determination by this court was whether the final judgment of the state court deprived Kennard of his office in violation of the above clause of the Fourteenth Amendment. And this view was not controverted by the attorney for the defendant, also an able lawyer. The latter contended that the Fourteenth Amendment had no application because in what was done no departure from the principles of due process of law had occurred. The opinion of Chief Justice Waite delivering the judgment of this court thus opens: "The sole question presented for our consideration in this case, as stated by the counsel for the plaintiff in error, is, whether the State of Louisiana, acting under the statute of January 15, 1873, through her judiciary, has deprived Kennard of his office without due process of law." Of course, this court had no jurisdiction to inquire whether there had been due process of law in the proceedings in the state court, unless the office in dispute or the right to hold it was property within the meaning of the Fourteenth Amendment, or unless

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Kennard's liberty was involved in his holding and discharging the duties of the office to which, as he insisted, he had been lawfully elected. But this court took jurisdiction of the case and affirmed the judgment of the Supreme Court of Louisiana upon the ground that the requirement in the Fourteenth Amendment of due process of law had not been violated. If, in the judgment of this court, as constituted when the *Kennard* case was decided, an office held under the authority of a State was not "property" within the meaning of the Fourteenth Amendment, the case would have been disposed of upon the ground that no Federal right had been or could have been violated, and the court would not have entered upon the inquiry as to what, under the Fourteenth Amendment, constituted due process of law in a case of which—according to the principles this day announced—it had no jurisdiction.

In *Foster* v. *Kansas*, 112 U. S. 201—which was a writ of error to review the final judgment of the Supreme Court of Kansas—the sole issue was as to the right of Foster to hold the office of county attorney. The defendant in error moved to dismiss the writ for want of jurisdiction in this court, and accompanied the motion with a motion to affirm. This court refused to dismiss the case, and referring to *Kennard* v. *Louisiana*, affirmed the judgment upon the ground that there had been, in its opinion, no departure from due process of law in the proceedings to remove Foster. It never occurred to the court, nor to any attorney in the case, that the Fourteenth Amendment did not embrace the case of a state office from which the incumbent was removed without due process of law. If such an office was not deemed property within the meaning of that Amendment, that was an end of the case here. But this court took jurisdiction and disposed of the case upon the ground that the requirement in the Federal Constitution of due process of law had been observed.

In *Boyd* v. *Thayer*, 143 U. S. 135, which came here upon writ of error to review the final judgment of the Supreme Court of Nebraska ousting Boyd from the office of Governor, and putting Thayer into that position, all the Justices, except Mr. Justice Field, concurred in holding that this court had

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jurisdiction of the case. In his dissenting opinion Mr. Justice Field observed: "I do not think this court had any jurisdiction to determine a disputed question as to the right to the governorship of a State, however that question may be decided by its authorities." He continued, quoting the language of Mr. Justice Nelson in another case: "'The former [General Government] in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment "reserved," are as independent of the General Government as that Government within its sphere is independent of the States. *The Collector* v. *Day*, 11 Wall. 113, 124.' In no respect is this independence of the States more marked, or more essential to their peace and tranquillity, than in their absolute power to prescribe the qualifications of all their state officers, from their chief magistrate to the lowest official employed in the administration of their local government; to determine the matter of their election, whether by open or secret ballot, and whether by local bodies or by general suffrage; the tenure by which they shall hold their respective offices; the grounds on which their election may be contested, the tribunals before which such contest shall be made, the manner in which it shall be conducted; and the effect to be given to the decision rendered. With none of these things can the Government of the United States interfere. In all these particulars the States, to use the language of Mr. Justice Nelson, are as independent of the General Government as that Government within its sphere is independent of the States. Its power of interference with the administration of the affairs of the State and the officers through whom they are conducted extends only so far as may be necessary to secure to it a republican form of government, and protect it against invasion, and also against domestic violence on the application of its legislature, or of its executive when that body cannot be convened. Const. Art. IV, sec. 4. Except as required for these purposes, it can no more interfere with the qualifications, election and installation of the state officers than a foreign government. And all attempts at interference with them in those respects by the executive, legislative or judicial departments of the General Government are in my

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judgment so many invasions upon the reserved rights of the States and assaults upon their constitutional autonomy. No clause of the Constitution can be named which in any respect gives countenance to such invasion. The fact that one of the qualifications prescribed by the State for its officers can only be ascertained and established by considering the provisions of a law of the United States in no respect authorizes an interference by the General Government with the state action."

This court had a different view of these questions, and, taking jurisdiction, considered the merits of the case, so far as it involved Federal questions, and rendered a judgment which, by its necessary operation, put into the office of Governor of Nebraska one whom the highest court of that State had adjudged not to be the lawful incumbent.

The latest case involving the present question is *Wilson* v. *North Carolina*, 169 U. S. 586. That was an action in the nature of *quo warranto* to test the title to a state office. Judgment was rendered for the plaintiff. The defendant claimed that the state statute and the action taken under it not only deprived him of his office without due process of law, but denied to him the equal protection of the laws, both in violation of the Fourteenth Amendment. In this court a motion to dismiss the writ of error was sustained upon the ground that, looking at what occurred in the state court, there was "no fair color for claiming that his (the plaintiff's) rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws." After observing that this court would be very reluctant to decide that we had jurisdiction in the case presented and could supervise and review the political administration of a state government by its own officials and through its own courts, great care was taken to say: "The jurisdiction of this court would only exist in case there had been, by reason of the statute and the proceedings under it, such a plain and substantial departure from the fundamental principles upon which our Government is based that it could with truth and propriety be said that if the judgment were suffered to remain, the party aggrieved would be deprived of

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his life, liberty or property in violation of the provisions of the Federal Constitution." Here, as I think, is a distinct declaration that this court has jurisdiction to review the final judgment of a state court, involving the title to a state office, where there has been a plain and substantial departure from the principles that underlie the requirement of due process of law. The opinion in *Wilson* v. *North Carolina* shows a deliberate consideration of the scope of the Fourteenth Amendment, and a refusal to hold, as is now held, that a contest about a state office could not, under any circumstances, involve rights secured by that Amendment. We there substantially declared that the constitutional requirement of due process of law could be enforced by this court where, in depriving a party of a state office, there had been a plain and substantial departure from the fundamental principles upon which our Government is based.

It thus appears that in four cases, heretofore decided, this court has proceeded upon the ground that to deprive one without due process of law of an office created under the laws of a State, presented a case under the Fourteenth Amendment to the Constitution of the United States of which we could take cognizance and inquire whether there had been due process of law.

Nothing to the contrary was decided in the *Sawyer* case, 124 U. S. 8. That case contains no suggestion that an office is not property. The only point there in judgment was that a court of equity could not control the appointment or removal of public officers. The court said: "The reasons which preclude a court of equity from interfering with the appointment or removal of public officers of the government from which the court derives its authority apply with increased force when the court is a court of the United States and the officers in question are officers of a State." But care was taken further to say: "If a person claiming to be such officer is, by the judgment of a court of the State, either in appellate proceedings, or upon a mandamus or *quo warranto*, denied any right secured to him by the Constitution of the United States, he can obtain relief by a writ of error from this court." So that the *Sawyer* case directly supports the proposition that the judg-

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ment of the highest court of a State depriving one of a state office may be reëxamined here, if the incumbent has specially claimed that he has been deprived of it without due process of law. That the point adjudged in *Sawyer's* case was as I have stated is seen from the opinion in *White* v. *Berry*, 171 U. S. 199, in which it was said: "But the court in its opinion in that case observed that under the Constitution and laws of the United States the distinction between law and equity, as existing in England at the time of the separation of the two countries, had been maintained although both jurisdictions were in the same courts, and held that a court of equity had no jurisdiction over the appointment and removal of public officers, and that to sustain a bill in equity to restrain or relieve against proceedings for the removal of public officers would invade the domain of the courts of common law, or of the executive and administrative departments of the Government."

Notwithstanding the above adjudications, the decision to-day is that this court has no jurisdiction, under any circumstances, to inquire whether a citizen has been deprived, without due process of law, of an office held by him under the constitution and laws of his State. If the contest between the one holding the office and the person seeking to hold it is determinable by the Legislature in a prescribed mode, this court, it appears, cannot inquire whether that mode was pursued nor interfere for the protection of the incumbent, even where the final action of the Legislature was confessedly capricious and arbitrary, inconsistent with the fundamental doctrines upon which our Government is based and the recognized principles that belong to due process of law, and not resting, in any degree, on evidence. If the Kentucky Legislature had wholly disregarded the mode prescribed by the statutes of that Commonwealth, and without appointing a Board of Contest composed of its own members, had, by joint resolution simply—without any evidence whatever or without notice to Taylor and without giving him an opportunity to be heard—declared Goebel to be Governor, this court, as we are informed by the decision just rendered, would be without jurisdiction to protect the incum-

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bent, for the reason, as is now adjudged, that the office in dispute is not "property" within the meaning of the Fourteenth Amendment. So that while we may inquire whether a citizen's land, worth a hundred dollars, or his mules, have been taken from him by the legislative or judicial authorities of his State without due process of law, we may not inquire whether the legislative or judicial authorities of a State have, without due process of law, ousted one lawfully elected and holding the office of Governor for a fixed term, with a salary payable at stated times, and put into his place one whom the people had said should not exercise the authority appertaining to that high position. It was long ago adjudged by the Court of Appeals of Kentucky that an office was "a valuable right and interest." *Page* v. *Hardin*, 8 B. Mon. 672. In *Commonwealth* v. *Jones*, 10 Bush, 735, the same court, referring to the provision in the constitution of Kentucky depriving any person who fought a duel of the right to hold an office, said: "It, in effect, dispossesses him of a right which the Supreme Court of the United States terms inalienable (4 Wall. 321), takes from him rights, privileges and immunities to which he was theretofore entitled, and strips him of one of the most valuable attributes of citizenship. The word 'deprived' is used in this section in the same sense in which it is used in section 12 of the Bill of Rights and in the Fifth Article of Amendment to the Federal Constitution."

When the Fourteenth Amendment forbade any State from depriving any person of life, liberty or property without due process of law, I had supposed that the intention of the People of the United States was to prevent the deprivation of any legal right in violation of the fundamental guarantees inhering in due process of law. The prohibitions of that amendment, as we have often said, apply to all the instrumentalities of the State, to its legislative, executive and judicial authorities; and therefore it has become a settled doctrine in the constitutional jurisprudence of this country that "whoever by virtue of public position under a state government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the con-

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stitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or, as we have often said, the constitutional prohibition has no meaning, and the State has clothed one of its agents with power to annul or evade it." *Ex parte Virginia*, 100 U. S. 339; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226; *Scott* v. *McNeal*, 154 U. S. 34. Alluding to a contention that the party—a railroad company—which invoked the Fourteenth Amendment for the protection of its property, had the benefit of due process of law in the proceedings against it, because it had due notice of those proceedings and was admitted to appear and make defence, this court has also said: "But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in its courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance and not to form." *Chicago, Burlington &c. Railroad* v. *Chicago*, above cited. Again, in another case: "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and unequal hand . . . it is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins*, 118 U. S. 373. See also *Henderson* v. *Mayor*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Neal* v. *Delaware*, 103 U. S. 370; *Soon* v. *Crowley*, 113 U. S. 703.

It is said that the courts cannot, in any case, go behind the final action of the legislature to ascertain whether that which was done was consistent with rights claimed under the Federal Constitution. If this be true then it is in the power of the state legislature to override the supreme law of the land. As long ago as *Davidson* v. *United States*, 96 U. S. 97, 102, this court, speaking by Mr. Justice Miller, said: "Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application

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where the invasion of private rights is effected under the forms of state legislation." More recently we have said: "The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. The function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land." *Smyth* v. *Ames*, 169 U. S. 466.

I had supposed that the principles announced in the cases above cited were firmly established in the jurisprudence of this court, and that, if applied, they would serve to protect every right that could be brought within judicial cognizance against deprivation in violation of due process of law.

It seems however—if I do not misapprehend the scope of the decision now rendered—that under our system of government the right of a person to exercise a state office to which he has been lawfully chosen by popular vote may, so far as the Constitution of the United States is concerned, be taken from him by the arbitrary action of a state legislature, in utter disregard of the principle that Anglo-Saxon freemen have for centuries deemed to be essential in the requirement of due process of law—a principle reaffirmed in the Kentucky Bill of Rights, which declares that "absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a Republic, not even in the largest majority." § 2. I cannot assent to the interpretation now given to the Fourteenth Amendment.

Let us look at the question from another standpoint. The requirement of due process of law is applicable to the United States as well as to the States; for the Fifth Amendment—which all agree is a limitation on the authority of Federal agen-

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cies—declares that "no person shall . . . be deprived of life, liberty or property without due process of law." If Congress by some enactment should attempt in violation of due process of law, to deprive one of an office held by him under the United States, will not the decision this day rendered compel this court to declare that such office is not property within the meaning of the Fifth Amendment, and therefore the incumbent would be without remedy unless he could invoke the protection of some other clause of the Constitution than the one in the Amendment relating to due process of law? Or, would the court hold that while a Federal office is property within the meaning of the clause in the Fifth Amendment declaring that "no person shall . . . be deprived of life, liberty or property without due process of law," a state office is not property within the meaning of the clause in the Fourteenth Amendment declaring, "nor shall any State deprive any person of life, liberty or property without due process of law?" Can it be that Congress may not deprive one of a Federal office without due process of law, but that a State may deprive one of a state office without due process of law?

I stand by the former rulings of this court in the cases above cited. I am of opinion that, equally with tangible property that may be bought and sold in the market, an office—certainly one established by the constitution of a State, to which office a salary is attached, and which cannot be abolished at the will of the legislature—is, in the highest sense, property of which the incumbent cannot be deprived arbitrarily in disregard of due process of law; that is, as this court said in *Kennard* v. *Louisiana*, in disregard of the "rules and forms which have been established for the protection of private rights." Apart from every other consideration, the right to receive and enjoy the salary attached to such an office is a right of property. And a right of property should be deemed property, unless we mean to play with words, and regard form rather than substance.

I go farther. The liberty of which the Fourteenth Amendment forbids a State from depriving any one without due process of law is something more than freedom from the enslavement of the body or from physical restraint. In my judgment the

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words "life, liberty or property" in the Fourteenth Amendment should be interpreted as embracing every right that may be brought within judicial cognizance, and therefore no right of that kind can be taken in violation of "due process of law."

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, this court unanimously held that the liberty mentioned in the Fourteenth Amendment "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Judge Cooley, speaking for the Supreme Court of Michigan in *People* v. *Hurlburt*, 24 Mich. 44, after observing that some things were too plain to be written, said: "Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted; it consists in the civil and political rights which are absolutely guaranteed, assured and guarded; in one's liberties as a man and a citizen—his right to vote, *his right to hold office*, his right to worship God according to the dictates of his conscience, his equality with all others who are his fellow citizens; all these guarded and protected and not held at the mercy and discretion of any one man or any popular majority. Story, Miscellaneous Writings, 620. If these are not now the absolute rights of the people of Michigan, they may be allowed more liberty of action and more privileges, but they are little nearer to constitutional freedom than Europe was when an imperial city sent out consuls to govern it."

The doctrine that liberty means something more than freedom from physical restraint is well illustrated in *Minor* v. *Happersett*, 21 Wall. 162, in which it was said that although the right of suffrage comes from the State, yet when granted it will be protected, and he "who has it can only be deprived of it by due process of law."

What more directly involves the liberty of the citizen than

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to be able to enter upon the discharge of the duties of an office to which he has been lawfully elected by his fellow citizens? What more certainly infringes upon his liberty than for the Legislature of the State, by merely arbitrary action, in violation of the rules and forms required by due process of law, to take from him the right to discharge the public duties imposed upon him by his fellow citizens in accordance with law? Can it be that the right to pursue a lawful calling is a part of one's liberty secured by the Fourteenth Amendment against illegal deprivation; and yet the right to exercise an office to which one has been elected and into which he has been lawfully inducted is no part of the incumbent's liberty, and may be disregarded by the mere edict of a legislative body, sitting under a constitution which declares that absolute, arbitrary power exists nowhere in a republic? Can it be that the right to vote, once given, cannot under the Fourteenth Amendment be taken away except by due process of law — and it was so decided in *Minor* v. *Happersett*, above cited — and yet that the right of the person voted for to hold and exercise the functions of the office to which he was elected can, without violating that Amendment, be taken away without due process of law? Does the liberty of an American embrace his right to vote without discrimination against him on account of race, color or previous condition of servitude, and yet not embrace his right to serve in a position of public trust to which he has been lawfully called by his fellow citizens who voted for him? The liberty of which I am speaking is that which exists, and which can exist, only under a republican form of government. "The United States," the supreme law of the land declares, "shall guarantee to every State in the Union a republican form of government." And "the distinguishing feature of that form," this court has said, "is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative powers reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *Duncan* v. *McFall*, 139 U. S. 461. But of what value is that right if the person selected by the people at the polls for an office provided for by the constitution, and holding a certificate

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of election, may be deprived of that office by the arbitrary action of the Legislature proceeding altogether without evidence?

I grant that it is competent for a State to provide for the determination of contested election cases by the Legislature. All that I now seek to maintain is the proposition that when a state legislature deals with a matter within its jurisdiction, and which involves the life, liberty or property of the citizen, it cannot ignore the requirement of due process of law. What due process of law may require in particular cases may not be applicable in other cases. The essential principle is that the State shall not by any of its agencies destroy or impair any right appertaining to life, liberty or property in violation of the principles upon which the requirement of due process of law rests. That requirement is "a restraint on the legislative as well as on the executive and judicial powers of the government." *Murray* v. *Land & Imp. Co.*, 18 How. 272, 276; *Scott* v. *McNeal*, above cited; *Chicago, Burlington &c. Railroad* v. *Chicago*, above cited. "That government can scarcely be deemed free," this court has said, "where the rights of property are left solely dependent upon the will of a legislative body without restraint." *Wilkinson* v. *Leland*, 2 Pet. 627.

It is to be regretted that it should be deemed necessary in a case like this to depart from the principles heretofore announced and acted upon by this court.

Looking into the record before us, I find such action taken by the body claiming to be organized as the lawful Legislature of Kentucky as was discreditable in the last degree and unworthy of the free people whom it professed to represent. The statute required the Board of Contest to give "true judgment" on the case, "according to the evidence." And when the statute further declared that the decision of the Board should be reported to the two Houses "for the future action of the General Assembly," that such decision should not be "final and conclusive," and that the General Assembly should determine the contest, it meant, of course, that such determination should rest upon the issues made by the parties and upon the evidence adduced before the Board of Contest. If the evidence had been before the Legislature it would have been physically im-

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possible to have examined it; for, as we have seen, its final action was taken immediately after the Board of Contest had reported its decision. But, as heretofore stated, the evidence, before the Board was not transmitted to the Legislature, nor were the grounds upon which the Board proceeded disclosed. Yet the body which assumed to determine who had been elected Governor, without having before it one particle of the proof taken upon the issues made by the notice of contest, "adjudged" that Goebel had been legally elected Governor of Kentucky. No such farce under the guise of formal proceedings was ever enacted in the presence of a free people who take pride in the fact that our American Governments are governments of laws and not of men. That which was done was not equivalent to a decision or judgment or determination by the Legislature of a matter committed to it by law. It should be regarded merely as an exercise of arbitrary power by a given number of men who defied the law. It is not a pleasant thing to say—but after a thorough examination of the record a sense of duty constrains me to say—that the declaration by that body of men that Goebel was legally elected ought not to be respected in any court as a determination of the question in issue, but should be regarded only as action taken outside of law, in utter contempt of the constitutional rights of freemen to select their rulers. They had no *jurisdiction* to *determine* the contest for Governor *except upon the evidence introduced before the Board of Contest*, and in the absence of such evidence they were without authority to declare anything except that Taylor's right to the office of Governor, based upon the certificate awarded him, had not been impaired. Their determination of the contest without having the evidence before them, could have no greater effect in law than if the issue had been determined simply by a joint resolution, without taking proof or without notifying or hearing the parties interested.

It is to be also said that a fair interpretation of the record leads irresistibly to the conclusion that the body of men referred to were wholly indifferent as to the nature of the evidence adduced before the Board of Contest, and that there was a fixed purpose on their part, whatever the facts might be, to

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put Goebel into office and to oust Taylor. Under the evidence in the case no result favorable to Goebel could have been reached on any ground upon which the Board of Contest or the Legislature had jurisdiction to act. The Constitution of Kentucky, as we have seen, declares that "the person *having* the highest number of votes shall be Governor." And the statute provides that the person returned having *received* the highest number of legal votes given "shall be adjudged to be the person elected and entitled to the office." With the constitution and the statutes of the State before him when preparing his notice to Taylor of contest, Goebel it is true did claim in very general terms that he was legally and rightfully elected; but he took care not to say—there is reason to believe that he purposely avoided saying—that he had *received* the highest number of legal votes cast for Governor. The evidence renders it clear that the declaration that he had received the highest number of legal votes cast was in total disregard of the facts—a declaration as extravagant as one adjudging that white was black, or that black was white. But such a declaration made by the body to which the Board of Contest reported should not surprise any one when it is remembered that it came from those who did not have before them any of the proofs taken in the case and were willing to act without proof. Those who composed that body seemed to have shut their eyes against the proof for fear that it would compel them to respect the popular will as expressed at the polls. Indignant, as naturally they were and should have been, at the assassination of their leader, they proceeded in defiance of all the forms of law, and in contempt of the principles upon which free governments rest, to avenge that terrible crime by committing another crime, namely, the destruction by arbitrary methods, of the right of the people to choose their Chief Magistrate. The former crime, if the offender be discovered, can be punished as directed by law. The latter should not be rewarded by a declaration of the inability of the judiciary to protect public and private rights, and thereby the rights of voters, against the wilful, arbitrary action of a legislative tribunal which, we must assume from the record, deliberately acted upon a contested election case involving the rights

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of the people and of their chosen representative in the office of Governor without looking into the evidence upon which alone any lawful determination of the case could be made. The assassination of an individual demands the severest punishment which it is competent for human laws in a free land to prescribe. But the overturning of the public will, as expressed at the ballot box, without evidence or against evidence, in order to accomplish partisan ends, is a crime against free government, and deserves the execration of all lovers of liberty. Judge Burnam, speaking for himself and Judge Guffy in the Court of Appeals of Kentucky, although compelled, in his view of the law, to hold the action of the Legislature to be conclusive, said: "It is hard to imagine a more flagrant and partisan disregard of the modes of procedure which should govern a judicial tribunal in the determination of a great and important issue than is made manifest by the facts alleged and relied on by the contestees, and admitted by the demurrer filed in the action to be true, and I am firmly convinced, both from these admitted facts and from knowledge of the current history of these transactions, that the General Assembly, in the heat of anger, engendered by the intense partisan excitement which was at the time prevailing, have done two faithful, conscientious and able public servants an irreparable injury in depriving them of the offices to which they were elected by the people of this Commonwealth, and a still greater wrong has been done a large majority of the electors of this Commonwealth, who voted under difficult circumstances to elect these gentlemen to act as their servants in the discharge of the duties of these great offices." I cannot believe that the judiciary is helpless in the presence of such a crime. The person elected, as well as the people who elected him, have rights that the courts may protect. To say that in such an emergency the judiciary cannot interfere is to subordinate right to mere power, and to recognize the Legislature of a State as above the supreme law of the land. The constitution of Kentucky expressly forbids the exercise of absolute and arbitrary power over the lives, liberty or property of freemen. And that principle is at the very foundation of the Government of the Union. Indeed, to sustain that principle our

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fathers waged the war for independence and established the Constitution of the United States. Yet by the decision this day rendered, no redress can be had in the courts when a legislative body, or one recognized as such by the courts, without due process of law, by the exercise of absolute, arbitrary power, and without evidence, takes an office having a fixed salary attached thereto from one who has been lawfully elected to such office by the voters of the State at a regular election. The doctrine of legislative absolutism is foreign to free government as it exists in this country. The cornerstone of our republican institutions is the principle that the powers of government shall, in all vital particulars, be distributed among three separate coordinate departments, legislative, executive and judicial. And liberty regulated by law cannot be permanently secured against the assaults of power or the tyranny of a majority, if the judiciary must be silent when rights existing independently of human sanction, or acquired under the law, are at the mercy of legislative action taken in violation of due process of law.

Other grounds are disclosed by the record which support the general proposition that the declaration by the body referred to that Goebel received the highest number of legal votes cast and was entitled to the office of Governor ought not to be regarded as valid, much less conclusive, upon the courts. But as those grounds have not been discussed by this court, and as it declines to determine the case upon the merits as disclosed by the evidence, I will not extend this opinion by commenting on them.

What has been said in this opinion as to the contest for Governor applies to the contest for Lieutenant Governor.

I am of opinion that the writ of error should not have been dismissed, and that the court should have adjudged that the decree below took from Taylor and Marshall rights protected by the Fourteenth Amendment of the Constitution of the United States.

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TAYLOR AND MARSHALL *v.* BECKHAM (No. 2).

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 604. Argued April 30, May 1, 1900. — Decided May 21, 1900.

It results from the conclusions announced in No. 603, *ante*, 548, that the writ of error in this case must be dismissed.

THE facts affecting this case are stated in *Taylor and Marshall* v. *Beckham* (*No* 1), *ante*, 548. It was argued with that case, and by the same counsel.

MR. CHIEF JUSTICE FULLER: These were suits in equity brought by Taylor and Marshall against Beckham, and one Carter, asserting himself to be the president *pro tempore* of the Senate of Kentucky, with the right to preside over that body though Marshall was present, in which complainants prayed for injunctions restraining defendants from interfering with complainants in their offices. These suits were heard with the case of *Beckham* v. *Taylor and Marshall*, just decided. When the Circuit Court of Jefferson County reached the conclusion that Beckham was entitled to the office of Governor and entered judgment of ouster, it dismissed the suits. From the decrees appeals were taken to the Court of Appeals of Kentucky, where they were affirmed, and thereafter a writ of error from this court was allowed.

It results from the conclusions announced in the preceding case that the writ of error must be dismissed, and it is so ordered.

MR. JUSTICE MCKENNA concurred in the result.

MR. JUSTICE BREWER and MR. JUSTICE BROWN concurred in a dissent for reasons stated in their dissent to *Taylor & Marshall* v. *Beckham* (*No.* 1), *ante*, 548.

MR. JUSTICE HARLAN dissented for reasons stated in his dissent to *Taylor & Marshall* v. *Beckham* (*No.* 1), *ante*, 548.

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DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 402. BOYLE *v.* SINCLAIR. Error to the Supreme Court of the State of Idaho. Submitted December 11, 1899. Decided May 14, 1900. *Per Curiam:* Dismissed with costs on the authority of *Wales* v. *Whitney*, 114 U. S. 564. *Mr. Samuel H. Hays* for motion to dismiss. *Mr. William A. Maury* opposing.

Decisions on Petitions for Writs of Certiorari.

No. 609. PIN KWAN *v.* UNITED STATES and No. 610. PING YIK *v.* UNITED STATES. Second Circuit. Granted April 30, 1900. *Mr. Richard Crowley* for petitioners. *Mr. Attorney General* and *Mr. Solicitor General* opposing.

No. 594. CENTRAL TRUST COMPANY OF NEW YORK *v.* INDIANA AND LAKE MICHIGAN RAILWAY COMPANY. Seventh Circuit. Denied April 30, 1900. *Mr. Augustus L. Mason*, *Mr. Adrian H. Joline* and *Mr. Henry Crawford* for petitioner. *Mr. Lawrence Maxwell, Jr.*, and *Mr. S. O. Pickens* opposing.

No. 588. O'BRIEN *v.* WHEELOCK. Seventh Circuit. Granted May 14, 1900. *Mr. Henry M. Duffield* for petitioners. *Mr. Benjamin Harrison* and *Mr. Thomas Worthington* opposing.

No. 571. NATIONAL BANK OF BALTIMORE *v.* BRUNSWICK TERMINAL COMPANY. Fourth Circuit. Denied May 14, 1900. *Mr. Wm. A. Fisher* and *Mr. Allan McLane* for petitioner. *Mr. Henry W. Williams* opposing.

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Decisions announced without Opinions.

No. 617. GUARANTEE COMPANY OF NORTH AMERICA *v.* MECHANICS SAVINGS BANK AND TRUST COMPANY. Sixth Circuit. Granted May 14, 1900. *Mr. William L. Granbery* for petitioner.

No. 618. SUN PRINTING AND PUBLISHING ASSOCIATION *v.* MOORE. Second Circuit. Granted May 14, 1900. *Mr. James Russell Soley* and *Mr. Franklin Bartlett* for petitioner. *Mr. George Zabriskie* and *Mr. James Lowndes* opposing.

No. 619. WERNER *v.* HEARST. Second Circuit. Denied May 14, 1900. *Mr. Roger M. Sherman* for petitioner. *Mr. Frederic D. McKenney* opposing.

No. 591. CITY OF LAMPASAS *v.* TALCOTT. Fifth Circuit. Denied May 14, 1900. *Mr. Clarence H. Miller* for petitioner.

No. 621. HOOK *v.* MERCANTILE TRUST COMPANY OF NEW YORK. Seventh Circuit. Denied May 21, 1900. *Mr. William Brown*, *Mr. S. P. Wheeler* and *Mr. E. P. Kirby* for petitioner. *Mr. Bluford Wilson* and *Mr. Philip Barton Warren* opposing.

No. 622. BENZ *v.* ILLINOIS CENTRAL RAILROAD COMPANY. Sixth Circuit. Denied May 21, 1900. *Mr. Thomas B. Turley* and *Mr. Don M. Dickinson* for petitioner. *Mr. J. M. Dickinson* opposing.

No. 626. HOLZAPFELS COMPOSITIONS COMPANY, LIMITED, *v.* RAHTJENS' AMERICAN COMPOSITION COMPANY. Granted May 21, 1900. *Mr. John G. Carlisle* for petitioner. *Mr. T. E. Kerr* and *Mr. Timothy D. Merwin* opposing.

No. 629. OWEN *v.* JONES, RECEIVER. Fifth Circuit. Denied

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May 21, 1900. *Mr. J. J. Darlington* and *Mr. Charles A. Douglass* for petitioners. *Mr. Alexander C. King* opposing.

No. 630. SMITH *v.* PACKARD. Seventh Circuit. Denied May 21, 1900. *Mr. A. B. Browne* and *Mr. Frank F. Reed* for petitioner. *Mr. Leroy D. Thomas* opposing.

No. 632. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO, *v.* SUTLIFF. Eighth Circuit. Granted May 21, 1900. *Mr. Charles S. Thomas* and *Mr. W. H. Bryant* for petitioner.

No. 637. CITY OF NEW YORK *v.* D'ESTERRE. Second Circuit. Denied May 21, 1900. *Mr. George L. Sterling* for petitioners. *Mr. Henry B. B. Stapler* opposing.

No. 638. NATIONAL BANK OF COMMERCE OF KANSAS CITY, MISSOURI, *v.* HOBBS. Second Circuit. Denied May 21, 1900. *Mr. Omar Powell* and *Mr. Elijah Robinson* for petitioner. *Mr. Charles E. Patterson* and *Mr. Alpheus T. Bulkeley* opposing.

No. 639. NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, *v.* GRAND VIEW BUILDING ASSOCIATION. Granted May 21, 1900. *Mr. Charles J. Greene* and *Mr. Ralph W. Breckenridge* for petitioner.

No. 640. DORSEY *v.* UNITED STATES. Eighth Circuit. Denied May 21, 1900. *Mr. J. M. Wilson* and *Mr. A. A. Hoehling, Jr.*, for petitioner. *Mr. Attorney General* and *Mr. Solicitor General* opposing.

No. 641. ROY, MASTER, *v.* SHIPS "WATERLOO" AND "GLENALOON" and No. 642. ROY, MASTER, *v.* GIRARD POINT STORAGE

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COMPANY. Third Circuit. Denied May 21, 1900. *Mr. John F. Lewis* and *Mr. Horace L. Cheney* for petitioner. *Mr. J. Rodman Paul* and *Mr. John Hampton Barnes* opposing.

No. 643. UNITED STATES REPAIR & GUARANTY COMPANY *v.* ASSYRIAN ASPHALT COMPANY. Seventh Circuit. Granted May 21, 1900. *Mr. Ernest Wilkinson* and *Mr. Lysander Hill* for petitioner.

No. 647. ANGLE, ADMINISTRATRIX, *v.* CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY. Seventh Circuit. Denied May 21, 1900. *Mr. Milton I. Southard*, *Mr. F. J. Lamb* and *Mr. Burr W. Jones* for petitioners. *Mr. Thomas Wilson* and *Mr. S. A. Lynde* opposing.

No. 648. LAKE STREET ELEVATED RAILROAD COMPANY *v.* FARMERS' LOAN & TRUST COMPANY. Circuit Court of the United States for the Northern District of Illinois. (Denied May 21, 1900. *Mr. Clarence Knight* for petitioner.) *Mr. Monroe L. Willard*, *Mr. Herbert B. Turner*, *Mr. Wm. Burry* and *Mr. John J. Herrick* opposing.

No. 650. UNITED STATES *v.* AMERICAN STEAMSHIP "LAURADA." Third Circuit. Granted May 21, 1900. Mr. Justice McKenna took no part in the decision of this petition. *Mr. Attorney General* and *Mr. Solicitor General* for petitioner. *Mr. Andrew C. Gray* opposing.

No. 649. CITY OF NEW ORLEANS *v.* WARNER. Fifth Circuit. Granted May 28, 1900. *Mr. Samuel L. Gilmore*, *Mr. Branch K. Miller* and *Mr. H. Generes Dufour* for petitioner. *Mr. Richard DeGray*, *Mr. J. D. Rouse*, *Mr. Wm. Grant* and *Mr. H. M. Jordan* opposing.

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Decisions announced without Opinions.

No. 655. YEAGER *v.* UNITED STATES. Court of Appeals of the District of Columbia. Denied May 28, 1900. *Mr. H. J. May* and *Mr. F. Edward Mitchell* for petitioner. *Mr. Attorney General* and *Mr. Solicitor General* opposing.

No. 656. BIRD *v.* HALSEY. Fourth Circuit. Denied May 28, 1900. *Mr. F. S. Kirkpatrick* for petitioner. *Mr. John W. Daniel* opposing.

No. 583. AMERICAN SUGAR REFINING COMPANY *v.* UNITED STATES. Second Circuit. Granted May 28, 1900. *Mr. John E. Parsons* and *Mr. Henry B. Closson* for petitioner. *Mr. Attorney General, Mr. Solicitor General* and *Mr. Assistant Attorney General Hoyt* opposing.

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APPENDIX.

I.

SUMMARY STATEMENT OF BUSINESS OF THE SUPREME COURT OF THE UNITED STATES FOR OCTOBER TERM, 1899.

Original Docket.

Number of cases,	18
Number of cases disposed of,	4
Leaving undisposed of,	14

Appellate Docket.

Number of cases on appellate Docket at close of October Term, 1898,	304
Number of cases docketed at October Term, 1899,	370
Total,	674
Number of cases disposed of at October Term, 1899,	371
Number of cases remaining undisposed of, showing a reduction of one case,	303

II.

AMENDMENT TO RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Ordered, That an amendment be made of Rule 31 of this court, to take effect at the commencement of October Term, 1900, so that the Rule as amended shall read as follows:

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31.

Form of Printed Records and Briefs.

All records, arguments and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

(Promulgated May 14, 1900.)

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INDEX.

ADMIRALTY.

Where this court in a collision case directed a decree dividing the damages as between the two vessels, and allowing to the owners of the cargo of one vessel a full recovery against the other vessel; and the court below, upon the production of the mandate of this court, refused to permit the latter vessel to recoup against the other one half the damages to the cargo, it was held that the remedy was by a new appeal and not by *mandamus* from this court, no disobedience of the mandate being shown. *The Union Steamboat Co.*, 317.

APPEAL.

See ADMIRALTY.

ATTACHMENT.

See NATIONAL BANK, 5.

BANKRUPTCY.

1. The provisions of the second clause of section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors. *Bardes* v. *Hawarden Bank*, 524.
2. The District Court of the United States can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy. *Ib.*
3. A District Court of the United States has no jurisdiction, without the proposed defendant's consent, to entertain an action of replevin by a trustee in bankruptcy to recover goods conveyed to the defendant by the bankrupt in fraud of the Bankrupt Act and of his creditors. *Bardes* v. *Hawarden Bank*, *ante*, 524, followed. *Mitchell* v. *McClure*, 539.
4. A District Court of the United States has jurisdiction, by the proposed defendant's consent, but not otherwise, to entertain a bill in equity by a trustee in bankruptcy to recover property conveyed to the defendant by the bankrupt in fraud of the Bankrupt Act and of his creditors. *Bardes* v. *Hawarden Bank*, *ante*, 524, followed. *Hicks* v. *Knost*, 541.

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5. After an adjudication in bankruptcy, an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun; and the District Court of the United States, sitting in bankruptcy, has jurisdiction by summary proceedings to compel the return of the property seized. *White* v. *Schloerb*, 542.

CALIFORNIA WATER RATES.

1. The appropriation and disposition of water in California is a public use, and the right to collect tolls or compensation for it is a franchise, subject to regulation and control in the manner prescribed by law, and such tolls cannot be fixed by the contract of the parties. *Osborne* v. *San Diego Land and Town Company*, 22.
2. It is not for the court to go into the reasonableness of the established rates, which are sought to be enforced in this case, but if the consumers are dissatisfied with them, resort must first be had to the body designated by law to fix proper rates, the board of supervisors of the county. *Ib.*

CASES AFFIRMED OR FOLLOWED.

1. The judgment in *High* v. *Coyne*, *ante*, 111, is followed in this case. *Fidelity Insurance Co.* v. *McClain*, 113.
2. *Knowlton* v. *Moore*, *ante*, 41, followed in this case as to the points there decided. *Murdock* v. *Ward*, 139.
3. *Plummer* v. *Coler*, *ante*, 115, affirmed and followed in this case. *Ib.*
4. *Knowlton* v. *Moore*, *ante*, 41, and *Murdock* v. *Ward*, *ante*, 139, followed. *Sherman* v. *United States*, 150.
5. It results from the conclusions announced in No. 603, *ante*, 548, that the writ of error in this case must be dismissed. *Taylor and Marshall* v. *Beckham* (*No. 2*), 548.

See BANKRUPTCY, 3, 4;
CONTRACT, 6, 7, 8;
INHERITANCE TAX, 6.

COAL MINE.

1. The act of Congress of March 3, 1891, concerning coal mines, makes three requirements: (1) Ventilation of not less than fifty-five feet of pure air per second, or 3300 cubic feet per minute for every fifty men at work, and in like proportions for a greater number; (2) proper appliances and machinery to force the air through the mine to the face of working places; (3) keeping all workings free from standing gas; and if either of these three requirements was neglected, to the injury of the plaintiff's intestates, the defendant was liable. *Deserant* v. *Cerillos Coal Railroad Co.*, 409.
2. The act does not give to mine owners the privilege of reasoning on the sufficiency of appliances for ventilation, or leave to their judgment the amount of ventilation that is sufficient for the protection of miners. *Ib.*

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3. It does not allow standing gas, but requires the mine to be kept clear of it, and if this is not done the consequence of neglecting it cannot be excused because some workman may disregard instructions. *Ib.*
4. It is the master's duty to furnish safe appliances and safe working places, and if the neglect of this duty concurs with that of the negligence of a fellow-servant, the master is liable. *Ib.*
5. On the issues made, and on the evidence, and regarding the provisions of the act of Congress, the instructions given by the trial court to the jury were erroneous. *Ib.*

CONSTITUTIONAL LAW.

1. It is a doctrine firmly established that the law of a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy. *Clarke* v. *Clarke*, 186.
2. The courts of a State where real estate is situated have the exclusive right to appoint a guardian of a non-resident minor, and vest in such guardian the exclusive control and management of land belonging to said minor, situated within the State. *Ib.*
3. When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the Constitution and laws; and it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution, or some law or treaty of the United States, before jurisdiction can be maintained on this ground. *Western Union Telegraph Co.* v. *Ann Arbor Railroad Co.*, 239.
4. Bills were filed in Tennessee by the American National Bank and others against the Carnegie Land Company, a Virginia corporation, doing business in Tennessee under the provisions of the act which was under review in *Blake* v. *McClung*, 172 U. S. 239; 176 U. S. 59; and also against various creditors of that company. The prayer of the bill was that it might be taken as a general creditors' bill; and it was alleged that the company was insolvent, having a large amount of property in the State, which it had assigned for the benefit of its creditors, without preferences, which was in disregard of the statute of the State, that a receiver should be appointed, the assets marshaled and the creditors paid according to law. The company answered denying that it was insolvent, and claimed that the assignment should be held valid, and the trust administered by the assignees. During the pendency of the suit, Sully and Carhart, New York creditors, filed a bill, setting up that nearly all the assets, if not all of them in the hands of the assignee of the company, and sought to be impounded by the bill filed by the bank, were covered and conveyed to Sully, as trustee, and that Carhart was entitled to priority over all other creditors of the defendant in the appropriation of the assets covered by the deed of trust to Sully. They asked for leave to file that bill as a general bill against the land company, or, if that could not be done, that they might file it in the

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case of the bank against the land company, as a petition in the nature of a cross-bill against that company. Other proceedings took place which are set forth in detail in the statement of the case. They ended in the consolidation of the various proceedings into one action and a reference to a master to take proof of all the facts. The master made his report, upon which a final decree was entered. It was decreed that the land company, by its deed of general assignment, of June 3, 1893, in making disposition therein for the payment of its creditors, without any preferences, attempted to defeat the preferences given by law to creditors, residents of Tennessee, over non-resident creditors and mortgagees, whose mortgages were made subsequent to the creation of the debts due resident creditors, and that such deed was fraudulent in law, and void; that the making of the deed was an act of insolvency by the land company, and that the bill filed by the bank was properly filed, and should be sustained as a general creditors' bill, and that the assets of the company under the jurisdiction of the court were subject to distribution under the law relating to foreign corporations doing business in Tennessee, and as such should be decreed in the action then pending. The decree further adjudged that Carhart was a *bona fide* holder of the bonds mentioned in his bill, and that he was entitled to recover thereon as provided for in the decree, but subject to the payment of debts due residents of Tennessee prior to the registration of such mortgage. It was also decreed that the Travelers' Insurance Company by its mortgage acquired a valid lien upon the property covered by it, subordinate, however, to debts due residents of Tennessee contracted prior to the registration thereof, and also subject to some other liabilities of the land company. The case was taken to the Court of Chancery Appeals, which modified in some particulars the decree of the chancellor, and after such modification it was affirmed. Upon writ of error from the Supreme Court the case was there heard, and that court held that the statute in question, providing for the distribution of assets of foreign corporations doing business in that State, was constitutional, and was not in contravention of any provision of the Constitution of the United States. The decree of the Court of Appeals was, after modifying it in some respects, affirmed. The case was then brought here on writ of error. *Held:* (1) That on an appeal from a state court the plaintiff in error in this court must show that he himself raised the question in the state court which he argues here, and it will not aid him to show that some one else has raised it in the state court, while he failed to do so; but if he raised it in the Supreme Court of the State, it is sufficient; (2) that the allegation in Carhart's case that he was a resident of New York is a sufficient allegation of citizenship, no question having been made on that point in the courts below; (3) that a Tennessee general creditor has the same right of preference as against a resident mortgagee that he has against a non-resident, and the same burden that is placed upon non-resident mortgagees and judgment creditors is by the statute placed upon resident mortgagees and judgment creditors; (4) that there is no foundation for the claim made, on behalf of Carhart, that

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section 5 of the Tennessee act of 1877 violates section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the non-resident mortgagee of his property without due process of law; but, on the contrary, the question has been decided the other way in *Blake* v. *McClung*; (5) that there has been no denial by the State of Tennessee of the equal protection of the laws to any person within its jurisdiction. *Sully* v. *American National Bank*, 289.

5. Under a statute of Connecticut, a contract was entered into between the city of Bridgeport and a railroad company providing that the city should pay one sixth of the expense of abolishing grade crossings, and also of increasing the tracks of the company from two to four. Defendants, whose lands were sought to be condemned for this purpose, objected upon the ground that the agreement of the city to pay one sixth of the expense of increasing the number of tracks was a practical donation by the city to the railroad company in violation of the state constitution, and was also a taking of their property without due process of law under the Fourteenth Amendment to the Federal Constitution. *Held*, that the Supreme Court of the State having decided that the right to condemn the land did not depend upon the obligation of the city to pay a part of the expenses, and that the defendants could not prevent a condemnation by showing that the company might not afterwards obtain a reimbursement from the city, and also that the defendants, not alleging that they were taxpayers or specially interested, were not in any position to question the validity of the proceedings, it followed that their property was not taken without due process of law. *Wheeler* v. *New York, New Haven & Hartford Railroad Co.*, 321.

6. Within the meaning of the constitutional provisions relating to actions instituted by private persons against a State, this suit, though in form against an officer of the State of California, is in fact against the State itself. *Smith* v. *Reeves*, 436.

7. By § 3669 of the Political Code of California, which provides that any person dissatisfied with the assessment made upon him by the State Board of Equalization, may, after payment and on the conditions named in the act, bring an action against the state Treasurer for the recovery of the amount of taxes and percentage so paid to the Treasurer, or any part thereof, the State has not consented to be sued except in its own courts. *Ib.*

8. It was competent for the State to couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments made by the state board, the condition that the suit be brought in one of its own courts. *Ib.*

9. A suit brought against a State by one of its citizens is excluded from the judicial power of the United States, even when it is one arising under the Constitution and laws of the United States, and the same rule applies to suits of a like character brought by Federal corporations against a State without its consent. *Ib.*

10. By the Revised Statutes of the United States it is provided: "§ 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege

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secured to him by the Constitution and laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States. § 5509. If in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offence is committed." Several persons were indicted under the above provisions in the Circuit Court of the United States for the Northern District of Alabama for the crime of murder committed in execution of a conspiracy to injure, oppress, threaten and intimidate one Thompson because of his having informed the United States authorities of violations by the conspirators of the laws of the United States relating to distilling. In Alabama murder in the first degree is punishable by death or imprisonment for life at the discretion of the jury. At the preliminary trial before a United States commissioner, Taylor, one of the accused, testified and his evidence was put in writing and signed by him. It was sufficient, if accepted, to establish the guilt of all the defendants. The accused had opportunity to cross-examine him. At the final trial in the Circuit Court, Taylor, who had pleaded guilty, was called as a witness for the Government, but did not respond. He had disappeared, although seen in the corridor of the court-building about an hour before being called. His absence was not by the procurement or advice of the accused, but was due to the negligence of the officers of the Government. The court, over the objections of the accused, allowed Taylor's written statements made under oath at the examining trial to be read in evidence to the trial jury. The accused were found guilty as charged in the indictment and sentenced to the penitentiary for life. At the trial one of the accused testified and stated that he and Taylor committed the murder, and that the other defendants knew nothing of it and had nothing to do with it. *Held:* (1) That no constitutional objection could be urged against sections 5508 and 5509; (2) that under the act of January 15, 1897, c. 29, 29 Stat. 487, the Circuit Court could not have imposed the penalty of death for the offence charged, but only imprisonment for life; (3) that under the Circuit Court of Appeals Act, 1891, any criminal case involving the construction or application of the Constitution of the United States, can be brought after final judgment directly to this court from the Circuit Court; (4) that the admission as evidence of the written statements made by Taylor at the examining trial was in violation of the rights of the accused under the clause of the Sixth Amendment of the Constitution of the United States declaring that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witness against him; (5) that the defendant who testified under oath

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as to his guilt, and whose testimony was sufficient to convict him, independently of Taylor's written statement at the examining trial was not entitled to a reversal for the error committed in allowing that statement to be read, because it could not have prejudiced him. *Motes* v. *United States*, 458.

11. By the constitution and laws of Kentucky, the determination of contests of the election of Governor and Lieutenant Governor is, and for a hundred years has been, committed to the General Assembly of that Commonwealth. The Court of Appeals of Kentucky decided that the courts had no power to go behind the determination of the General Assembly in such a contest, duly recorded in the journals thereof; that the office of Governor or of Lieutenant Governor was not property in itself; and, moreover, that, under the constitution and laws of Kentucky, such determination being an authorized mode of ascertaining the result of an election for Governor and Lieutenant Governor, the persons declared elected to those offices on the face of the returns by the Board of Canvassers, only provisionally occupied them because subject to the final determination of the General Assembly on contests duly initiated. *Held:* (1) That the judgment of the Court of Appeals to the effect that it was not empowered to revise the determination by the General Assembly adverse to plaintiffs in error in the matter of election to these offices was not a decision against title, right, privilege or immunity secured by the Constitution of the United States; and plaintiffs in error could not invoke jurisdiction because of deprivation, under the circumstances, of property or vested rights, without due process of law; (2) that the guarantee by the Federal Constitution to each of the States of a republican form of government was intrusted for its enforcement to the political department, and could not be availed of, in connection with the Fourteenth Amendment, to give this court jurisdiction to revise the judgment of the highest court of the State that it could not review the determination of a contested election of Governor and Lieutenant Governor by the tribunal to which that determination was exclusively committed by the state constitution and laws, on the ground of deprivation of rights secured by the Constitution of the United States. *Taylor and Marshall* v. *Beckham (No. 1)*, 548.

See INHERITANCE TAX, 4.

CONTRACT.

1. After a careful review of all the cases, American and English, relating to anticipatory breaches of an executory contract, by a refusal on the part of one party to it to perform it, the court holds that the rule laid down in *Hochster* v. *De la Tour*, 2 El. & Bl. 678, is a reasonable and proper rule to be applied in this case. *Roehm* v. *Horst*, 1.

2. That rule is that after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it; but that an option should be allowed to the injured party, either to sue immediately, or

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to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option. *Ib.*

3. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. *Ib.*

4. As to the question of damages, when the action is not premature, the plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. *Ib.*

5. The plaintiff in error is a corporation, organized under the laws of the State of New York, and doing business as life insurers in the city of New York. It had an agent in the State of Washington, to whom Phinney, a resident in that State applied for a policy on his life. The application stated that it was made subject to the charter of the company and the laws of New York. A policy was issued which provided that on its maturing payment was to be made at the home office of the company in New York, and on its receipt Phinney paid the first premium. The policy provided that he should pay a like premium for twenty years, if he should live so long, and that the policy should become void by non-payment of the premium, with a forfeiture of previous payments. Phinney failed to make the next annual payment. Then he surrendered the policy to the local agent. He died without having made that payment, or the next one which matured before his death. His widow was appointed his executrix. She presented to the company a claim for the amount of the insurance under the policy. It was rejected. This suit was thereupon brought. In its answer the company set up that the contract was not to be taken as a contract under the laws of the State of New York, but under the laws of the State of Washington, and the company asked this instruction, which the court declined to give; "If you find from the evidence in this case that the said Guy C. Phinney stated to the representative of the defendant in the State of Washington that he could not pay the premium falling due September 24, 1891, and that he did not pay nor tender the same, and that he thereafter surrendered said policy to the defendant's representative, they mutually believing and understanding that the same was of no force or validity then or thereafter, by reason of the non-payment of the said premium, this would constitute an abandonment and rescission of this contract by both parties thereto, and would put an end to the same; and if you find the facts so to be, you must find a verdict for the defendant." The jury trial resulted in a verdict and judgment for the plaintiff. This was taken in error to the Court of Appeals for the Ninth Circuit which dismissed the writ of error on the ground that it had no jurisdiction by reason of a failure on the part of the plaintiff in error to file the writ in the office of the trial court. *Held:* (1) That the Court of Appeals had jurisdiction; (2) that, without deciding it, the court would hold for the purposes of this case that the contract was made under the laws of the State of New York, and was governed by

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the laws of that State; (3) that it is to be presumed that each party knew what the laws of New York were, and neither could be misled by any statement in respect thereto on the part of the other; (4) that there is nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as with any other contract, and if they chose to abandon it their action is conclusive. *Mutual Life Insurance Co.* v. *Phinney*, 327.

6. In view of what has been already decided in *Mutual Life Insurance Company* v. *Phinney*, *ante*, 327, the court holds that it is needless to do more than note the fact that, as shown by the answer, after the insured had once defaulted in May, 1892, and a second default had occurred in May, 1893, application was made to him by the company, through its agents, to restore the policy, and that he declined to make any further payments or to continue the policy, and elected to have it terminated, which election was accepted by the company, and the parties to the contract treated it thereafter as abandoned, and that there is nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as with any other contract; and if they choose to abandon it, their action is conclusive. *Mutual Life Ins. Co.* v. *Sears*, 345.
7. This case falls within the same rule as *Mutual Life Insurance Co.* v. *Phinney*, *ante*, 327, and *Mutual Life Insurance Co.* v. *Sears*, *ante*, 345, and is disposed of in the same way. *Mutual Life Insurance Co.* v. *Hill*, 347.
8. *Mutual Life Insurance Co.* v. *Sears*, *ante*, 345, followed. *Mutual Life Ins. Co.* v. *Allen*, 351.
9. Clark contracted with the railway company for the construction of part of its road. He also contracted for the completion of his work on a day named. It was not conpleted till some time after that day. Clark contended that the failure was caused by the neglect of the company to procure a right of way. When the time for settlement came there were also other disputes between him and the company, which are set forth in detail in the statement of facts. The result was that Clark signed a paper in which, after stating the disputed claims in detail, it was said: "Now therefore be it known that I, the said Heman Clark, have received of and from the said Chicago, Milwaukee and St. Paul Railway Company, the sum of one hundred and seventy-three thousand, five hundred and thirty-two and $\frac{49}{100}$ dollars, in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from or growing out of said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of said railway company to account for said forty thousand dollars, as herein provided." This paper after signature was given by him to the railway company, and in return they gave him a check for the balance named. Five years and more after this transaction this action was brought to recover the disputed claims. *Held*, that Clark was barred by his release from recovering the disputed sums. *Chicago, Milwaukee and St. Paul Railway Co.* v. *Clark*, 353.
10. The rule laid down in *Cumber* v. *Wane*, 1 Strange, 426, that where a liquidated sum is due, the payment of a less sum in satisfaction thereof,

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though accepted as satisfaction, is not binding as such for want of consideration, has been much questioned and qualified, and is considered so far with disfavor, as to be confined strictly to cases within it. *Ib.*

11. The city of Rochester invited proposals from contractors for two separate contracts for work to be done for the improvement of its water works. Among others who bid were the petitioners, the Moffett, etc., Company, who put in bids for each. Owing to causes which are set forth in full in the opinion of the court, some serious mistakes were made in the figures in their proposals, whereby the compensation that they would receive if their bids were accepted and the work performed by them would be diminished many thousand dollars. When the bids were opened by the city government their bids were the first opened, and as they were read aloud their engineer noticed the errors and called attention to them and stated what the figures were intended to be and should be. The statutes of New York provided that "neither the principal nor sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made and the same shall have been duly executed." The city government rejected one of their bids and accepted the other, and called for its performance at the prices stated in the bid. The company declined to enter into a contract for the performance of the work at that price; and, claiming that the city threatened to enforce the bond given with the proposals, brought suit praying for a reformation of the proposals to conform to the asserted intention in making them and their execution as reformed, or their rescission; and for an injunction against the officers of the city, restraining them from declaring the complainant in default, and from forfeiting or enforcing its bond. Judgment was rendered in the Circuit Court in the company's favor, which was reversed in the Circuit Court of Appeals. The case was then brought here on certiorari. *Held:* (1) That there was no doubt of the mistake on the part of the company; (2) that there was a prompt declaration of it as soon as it was discovered; (3) that when this was done the transaction had not reached the degree of a contract. *Moffett, Hodgkins & Clarke Company* v. *Rochester*, 373.

12. The party alleging a mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt on the mind of the court as to either of these points. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified. *Hearne* v. *Marine Ins. Co.*, 20 Wall. 488, cited on these points and approved. *Ib.*

13. The contract for life insurance in this case, made by a New York insurance company in the State of Missouri, with a citizen of that State, is subject to the laws of that State regulating life insurance policies, although the policy declares "that the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted as a whole and in each of its parts and obligations,

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according to the laws of the State of New York, the place of the contract being expressly agreed to be the principal office of the said company in the city of New York." *New York Life Insurance Co.* v. *Cravens*, 389.

14. The power of a State over foreign corporations is not less than the power of a State over domestic corporations. *Ib.*

5. The business of insurance is not commerce, and the making of a contract of insurance is a mere incident of commercial intercourse in which there is no difference whatever between insurance against fire, insurance against the perils of the sea, or insurance of life. *Ib.*

CORPORATION.

See CONTRACT, 14.

CRIMINAL LAW.

1. Under the Court of Appeals Act of March 3, 1891, a conviction for murder is a "conviction of a capital crime," though the jury qualify their verdict of guilty by adding the words "without capital punishment." The test of a capital crime is not the punishment which is imposed, but that which may be imposed under the statute. *Fitzpatrick* v. *United States*, 304.

2. Under the statute of Oregon requiring the offence to be stated "in ordinary and concise language and in such manner as to enable a person of common understanding to know what was intended," an indictment for murder charging that the defendant feloniously, purposely, and of deliberate and premeditated malice inflicted upon the deceased a mortal wound of which he instantly died is a sufficient allegation of premeditated and deliberate malice in killing him. *Ib.*

3. Evidence that one jointly indicted with the defendant was found to have been wounded in the shoulder, and his accompanying statement that he had been shot, were held to be competent upon the trial of the defendant. *Ib.*

4. Any fact which had a bearing upon the question of defendant's guilt immediate or remote and occurring at any time before the incident was closed, was held proper for the consideration of the jury, although statements made by other defendants in his absence implicating him with the murder would not be competent. *Ib.*

5. The prisoner taking the stand in his own behalf and swearing to an alibi was held to have been properly cross-examined as to the clothing worn by him on the night of the murder, his acquaintance with the others jointly indicted with him, and other facts showing his connection with them. *Ib.*

6. Where an accused party waives his constitutional privilege of silence and takes the stand in his own behalf and makes his own statement, the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness as to the circumstances connecting him with the alleged crime. *Ib.*

7. Evidence in rebuttal with respect to the effect of light from the flash of

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a revolver was held to be competent where the defence put in a calendar, apparently for the purpose of showing the time the moon rose that night. *Ib.*

See CONSTITUTIONAL LAW, 10.

CUSTOMS DUTIES.

May & Co., merchants at New Orleans, were engaged in the business of importing goods from abroad, and selling them. In each box, or case in which they were brought into this country, there would be many packages, each of which was separately marked and wrapped. The importer sold each package separately. The city of New Orleans taxed the goods after they reached the hands of the importer (the duties having been paid) and were ready for sale. *Held:* (1) That the box, case or bale in which the separate parcels or bundles were placed by the foreign seller, manufacturer or packer was to be regarded as the original package, and when it reached its destination for trade or sale and was opened for the purpose of using or exposing to sale the separate parcels or bundles, the goods lost their distinctive character as imports and each parcel or bundle became a part of the general mass of property in the State and subject to local taxation; (2) that *Brown* v. *Maryland*, 12 Wheat. 419, established these propositions: 1. That the payment of duties to the United States gives the right to sell the things imported, and that such right *to sell* cannot be forbidden or impaired by a State. 2. That while the things imported retain their character as imports, and remain the property of the importer, "in his warehouse, in the original form or package in which it was imported," a tax upon it is a duty on imports within the meaning of the Constitution. 3. A State cannot, in the form of a license or otherwise, tax the right of the importer *to sell*, but when the importer has *so acted upon* the goods imported that they have been incorporated or mixed with the general mass of property in the State, such goods have then lost their distinctive character as imports, and have become from that time subject to state taxation, not because they are the products of other countries, but because they are property within the State in like condition with other property that should contribute, in the way of taxation, to the support of the government which protects the owner in his person and estate. *May* v. *New Orleans*, 496.

EVIDENCE.

See CRIMINAL LAW, 3, 4, 5, 6, 7.

INHERITANCE TAX.

1. The plaintiffs in error were the executors of the will of Edwin F. Knowlton, of Brooklyn, New York. The defendant in error was the United States Collector of Internal Revenue for the First Collection District for the State of New York. Mr. Knowlton died at Brooklyn in October, 1898, and his will was duly proved. Under the portion of the Act of Congress of June 13, 1898, which is printed at length in a note to the opinion of the court in this case, the United States Collector of Internal Revenue demanded of the executors a return, showing the amount

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of the personal estate of the deceased, and the legatees and distributees thereof. This return the executors made under protest, asserting that the act of June 13 was unconstitutional. This return showed that the personal estate amounted to over two and a half millions of dollars, and that there were several legacies, ranging from under $10,000 each to over $1,500,000. The collector levied the tax on the legacies and distributive shares, but for the purpose of fixing the rate of the tax considered the whole of the personal estate of the deceased as fixing the rate for each, and not the amount coming to each individual legatee under the will. As the rates under the statute were progressive from a low rate on legacies amounting to $10,000, to a high rate on those exceeding $1,000,000, this decision greatly increased the aggregate amount of the taxation. The executors protested on the grounds, (1) that the provisions of the act were unconstitutional; (2) that legacies amounting to less than $10,000, were not subject to any tax or duty; (3) that a legacy of $100,000, taxed at the rate of $2.25 per $100, was only subject to the rate of $1.12½. Demand having been made by the collector for payment, payment was made under protest; and, after the Commissioner of Internal Revenue had refused to refund any of it, the executors commenced suit to recover the amount so paid. The Circuit Court sustained a demurrer upon the ground that no cause of action was alleged, and dismissed the suit, which was then brought here by writ of error. *Held:* (1) That the statute clearly imposes the duty on the particular legacies or distributive shares, and not on the whole personal estate; (2) that it makes the rate of the tax depend upon the character of the links connecting those taking with the deceased, being primarily determined by the classifications, and progressively increased according to the amount of the legacies or shares; (3) that the court below erred in denying all relief, and that it should have held the plaintiffs entitled to recover so much of the tax as resulted from taxing legacies not exceeding ten thousand dollars, and from increasing the tax rate with reference to the whole amount of the personal estate of the deceased from which the legacies or distributive shares were derived. *Knowlton* v. *Moore*, 41.

2. Death duties were established by the Roman and ancient law, and by the modern laws of France, Germany and other continental countries, England and her colonies, and an examination of all shows that tax laws of this nature rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit or the transmission from the dead to the living on which such taxes are more immediately vested. *Ib.*

3. When a particular construction of a statute will occasion great inconvenience, or produce inequality and injustice, that view is not to be favored if another and more reasonable interpretation is present in the statute. *Ib.*

4. The provision in section 8 of article I of the Constitution that "all duties, imports and excises shall be uniform throughout the United

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States," refers purely to a geographical uniformity, and is synonymous with the expression "to operate generally throughout the United States." *Ib.*

5. The statute considered in this case embraces the District of Columbia. *Ib.*
6. The assignments of error in this case raised only the constitutionality of the taxes sought to be recovered, which has just been decided adversely to the plaintiffs in error in *Knowlton* v. *Moore*, *ante*, 41, and there is nothing in the record to enable the court to see that the statute was mistakingly construed by the collector; but as the interpretation of the statute which was adopted and enforced by the officers administering the law was the one held to be unsound in *Knowlton* v. *Moore*, the ends of justice require that the right to resist so much of the tax as may have arisen from the wrong interpretation of the statute should not be foreclosed by the decree of this court. *High* v. *Coyne*, 111.
7. The right to take property by will or descent is derived from and regulated by municipal law; and, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the state tax, or the law under which it is imposed. *Plummer* v. *Coler*, 115.
8. The relation of the individual citizen and resident to the State in which he resides is such that his right, as the owner of property, to direct its descent by will or permit its descent to be regulated by statute, and his right as legatee, devisee or heir to receive the property of his testator or ancestor, are rights derived from and regulated by the State; and no sound distinction can be drawn between the power of the State, in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents. *Ib.*

INSOLVENT DEBTOR.

General creditors attaching the goods of an insolvent debtor upon the ground that they had been purchased under fraudulent representations, when sued by chattel mortgagees of said debtor, may attack the mortgage by showing that the mortgagees knew that the goods had been fraudulently purchased. *Browning* v. *De Ford*, 196.

INSURANCE.

See CONTRACT, 1.

JURISDICTION.

A. GENERALLY.

1. A neglected right, if neglected too long, must be treated as an abandoned right, which no court will enforce. *Moran* v. *Horsky*, 205.

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B. JURISDICTION OF THE SUPREME COURT.

1. The defence of laches, put in in this case, is the assertion of an independent defence, proceeding upon the concession that there was, under the laws of the United States a prior right, and conceding that, says that the delay in respect to its assertion prevents its present recognition; and the court is of opinion that the decision of the Supreme Court of Montana in this case was based upon an independent non-Federal question, broad enough to sustain its judgment. *Moran* v. *Horsky*, 205.
2. For the reasons set forth in the opinion of the court, the case was dismissed for want of jurisdiction. *Pittsburgh & Lake Angeline Iron Co.* v. *Cleveland Iron Mining Co.*, 270.
3. The appellant herein filed its original petition in the Court of Claims against the United States and the Apache Indians on September 6, 1892. Subsequently and by leave of court an amended petition was filed March 2, 1894, from which it appears that the petitioner is a corporation chartered under the laws of the State of New York and doing business in the state of Chihuahua, county of Guleana, Republic of Mexico, and that property to the value of nearly seventy-five thousand dollars, belonging to the petitioner, and situated at the time in the Republic of Mexico, was taken therefrom in 1881 and 1882, and stolen and carried off by the Apache Indians, then in amity with the United States, and brought from the Republic of Mexico into the United States. By virtue of the act of Congress entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," approved March 3, 1891, judgment for the value of the property thus taken by the Indians was demanded. The United States filed a plea in bar, alleging that the claimant ought not to have and maintain its suit, "because the depredation complained of is alleged to have occurred in the Republic of Mexico, beyond the jurisdiction of the United States and the courts thereof, and that the court, therefore, had no jurisdiction to entertain this suit." The plaintiff demurred to the plea in bar as bad in substance. The Court of Claims overruled the demurrer, sustained the plea in bar, and dismissed the petition. *Held*, that the judgment of the Court of Claims was right, and it must be affirmed. *Corralitos Company* v. *United States*, 280.
4. This case is dismissed for want of jurisdiction, as the Supreme Court of Minnesota did not deny the validity of the New York statute with regard to insurance, but only construed it, and even granting that its construction was erroneous, faith and credit were not denied to the statute. *Banholzer* v. *New York Life Insurance Company*, 402.

See ADMIRALTY;
CONSTITUTIONAL LAW, 3, 4.

C. JURISDICTION OF CIRCUIT COURTS OF APPEAL.

1. Upon the showing made by the Court of Appeals it is clear that that court had jurisdiction, and should have proceeded to dispose of this case on its merits, instead of dismissing it for want of jurisdiction. *Mutual Life Insurance Co.* v. *Phinney*, 327.

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2. The record shows that the cause came on for trial without a jury, a trial by jury having been expressly waived by written consent of the parties, that a referee was duly appointed by similar consent, in accordance with the rules and customs of the District in which the trial was had, and that his findings, rulings and decisions were made those of the court. *Held*, that the question whether the judgment rendered was warranted by the facts found was open for consideration in the Circuit Court of Appeals, and is so here. *Chicago, Milwaukee and St. Paul Railway Co.* v. *Clark*, 353.

See CONTRACT, 5.

D. JURISDICTION OF CIRCUIT COURTS.

1. Where a plaintiff asserts, as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a mere *ad damnum* clause will not confer jurisdiction on the Circuit Court, but the court on motion or demurrer, or of its own motion, may dismiss the suit. *North American Transportation & Trading Co.* v. *Morrison*, 262.
2. In the circumstances disclosed by the plaintiff's declaration, and in the certificates of the trial judge, the defendant company, though liable in a court of competent jurisdiction for the other claims asserted, cannot be held for the amount of wages or profits which the plaintiff suggests he might have earned had he reached Dawson City. *Ib.*

See CONSTITUTIONAL LAW, 3;
NATIONAL BANK.

E. JURISDICTION OF DISTRICT COURTS.

See BANKRUPTCY.

MANDAMUS.

See ADMIRALTY;
NATIONAL BANK, 1.

NATIONAL BANK.

1. A national bank was closed by order of the Comptroller of the Currency and a receiver appointed. An assessment was made upon the holders of stock. Overton and Hoffer were among those who were assessed, and payment not having been made, suit was brought against them. Service was made upon H., but not upon O., who was very ill, and who died without service having been made upon him. He left a will, under which J. P. O. was duly appointed his executor. The executor was summoned into the suit by a writ of *scire facias*. A motion was made to set aside the *scire facias* and the attempted service thereof, which motion was granted. The executor being substituted in the place of the deceased as defendant, the court decided that it had acquired no jurisdiction over the deceased, and could acquire none over his executor. Thereupon the receiver applied to this court for a writ of mandamus to the Judges of the Circuit Court of the United States for the Ninth Circuit commanding them to take jurisdiction and proceed against

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J. P. O. as executor of the last will and testament of O., deceased, in the action brought by the receiver to recover the assessments. *Held:* (1) That mandamus was the proper remedy, and the rule was made absolute; (2) that the action of the Circuit Court in setting aside the *scire facias* was here for review; (3) that *scire facias* was the proper mode for bringing in the executor, and under Rev. Stat. § 955, it gave the court jurisdiction to render judgment against the estate of the deceased party in the same manner as if the executor had voluntarily made himself a party. *In re Connaway, Receiver*, 421.

2. An attachment sued out against a bank as garnishee is not an attachment against the bank or its property, nor a suit against it within the meaning of section 5242 of the Revised Statutes. *Earle* v. *Pennsylvania*, 449.
3. When the Chestnut Street National Bank suspended and went into the hands of a receiver, the entire control and administration of its assets were committed to the receiver and the comptroller, subject, however, to any rights or priority previously acquired by the plaintiff through the proceedings in the suit against Long. *Ib.*
4. The state court had no authority to order execution in favor of the plaintiff of any dividends upon the money on deposit in the bank to Long's credit at the time the bank was served with the attachment, and direct the sale of the shares of stock originally held by the bank as collateral security. *Ib.*
5. A receiver of a National Bank may be notified, by service upon him of an attachment issued from a state court, of the nature and extent of the interest sought to be acquired by the plaintiff in the attachment in the assets in his custody; but, for reasons stated in *Earle* v. *Pennsylvania*, *ante*, 449, such an attachment cannot create any lien upon specific assets of the bank in the hands of the receiver, nor disturb his custody of those assets, nor prevent him from paying to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, all moneys coming to his hands, or realized by him as receiver from the sale of the property and assets of the bank. *Earle* v. *Conway*, 456.

NAVAL BOUNTIES.

In this case it was rightly decided in the court below, that in determining under the provisions of Rev. Stat. sec. 902, whether the Spanish vessels sunk or destroyed at Manila were of inferior or superior force to the American vessels engaged in that battle, the land batteries, mines and torpedoes, not controlled by those in charge of the Spanish vessels, but which supported those vessels, were to be excluded altogether from consideration, and that the size and armaments of the vessels sunk or destroyed, together with the number of men upon them, were alone to be regarded in determining the amount of the bounty to be awarded. *Dewey* v. *United States*, 510.

NAVIGABLE WATERS.

The fourth and fifth sections of the River and Harbor Act, approved September 19, 1890, provide: "§ 4. That section nine of the River and

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Harbor Act of August 11, 1888, be amended and reënacted so as to read as follows: That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width or span, or otherwise, or where there is difficulty in passing the draw-opening of the draw-span of such bridge by rafts, steamboats or other water crafts, it shall be the duty of said Secretary, first giving the parties reasonable opportunities to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes to be made and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated to the end that the criminal proceedings mentioned in the succeeding section may be taken. § 5. That section ten of the River and Harbor Act of August 11, 1888, be amended and reënacted so as to read as follows: That if the persons, corporations or associations owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such person, corporation or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5000, and every month such person, corporation or association shall remain in default as to the removal or alteration of such bridge, shall be deemed a new offence and subject the person, corporation or association so offending to the penalties above described." 26 Stat. 426, 453, c. 907. Proceeding under that act the Secretary of War gave notice to the County Commissioners of Muskingum County, Ohio, to make on or before a named day certain alterations in a bridge over the Muskingum River, Ohio, at Taylorsville in that State. The Commissioners, although having control of the bridge did not make the alterations required and were indicted under the act of Congress. *Held*, that however broadly the act of Congress may be construed it ought not to be construed as embracing officers of a municipal corporation owning or controlling a bridge who had not in their hands, and under the laws of their State could not obtain, public moneys that could be applied in execution of the order of the Secretary of War within the time fixed by that officer to complete the alteration of such bridge. *Rider* v. *United States*, 251.

PRACTICE.

1. As the parties below proceeded upon a mutual mistake of law in construing and applying the statute the court thinks that the practical injustice that might result from an affirmance of the judgment may be

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avoided by reversing it at the cost of the plaintiff in error, and sending the cause back to the Circuit Court, with directions to proceed therein according to law. *Murdock* v. *Ward*, 139.

2. After the company had once excepted to the refusal of an instruction which it had asked, and excepted to those which were given, it did not lose the benefit of such exceptions by a request that the court repeat the instructions excepted to, in connection with certain answers made to questions propounded by the jury. *Mutual Life Insurance Co.* v. *Phinney*, 327.

PUBLIC LAND.

1. Whenever the invalidity of a land patent does not appear upon the face of the instrument, or by matters of which the courts will take judicial notice, and the land is apparently within the jurisdiction of the land department as ordinary public land of the United States, then it would seem to be technically more accurate to say that the patent was voidable, not void. *Moran* v. *Horsky*, 205.
2. The right of one who has actually occupied public land, with an intent to make a homestead or preëmption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent. *Tarpey* v. *Madsen*, 215.
3. The law deals tenderly with one who, in good faith, goes upon public lands, with a view of making a home thereon. *Ib.*
4. When the original entryman abandons the tract entered by him, and it comes within the limits of a grant to a railroad company, a third party, coming in after the lapse of many years, and setting up the title of that entryman, does not come in the attitude of an equitable appellant. *Ib.*
5. A proper interpretation of the acts of Congress making railroad grants like the one in this case requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company, in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other, the declaration or entry in the local land office; and while, as repeatedly held, the railroad company may not question the validity or propriety of the entryman's claim of record, its rights ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation. *Ib.*
6. An applicant for public land under the act of Congress of June 3, 1878, 29 Stat. 89, c. 151, known as the Timber and Stone Act, must support his application by an affidavit stating that "he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the reg-

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ister or receiver of the land office within the district where the land is situated." The same act provides: "If any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, *except in the hands of bona fide purchasers*, shall be null and void." *Hawley* v. *Diller*, 476.

7. An entryman under this act acquires only an equity, and a purchaser from him cannot be regarded as a *bona fide* purchaser within the meaning of the act of Congress unless he become such after the Government, by issuing a patent, has parted with the legal title. *Ib.*
8. A construction of the above act long recognized and acted upon by the Interior Department should not be overthrown unless a different one is plainly required by the words of the act. *Ib.*
9. The result of the decisions of this court in relation to the jurisdiction of the Land Department when dealing with the public lands is as follows: (1) That the Land Department of the Government has the power and authority to cancel and annul an entry of public land when its officers are convinced, upon a proper showing, that the same was fraudulently made; (2) that an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and applied for the same, and in all respects complied with the requirements of the law; (3) that the Land Department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee; and (4) that redress can always be had in the courts where the officers of the Land Department have withheld from a preëmptioner his rights, where they have misconstrued the law, or where any fraud or deception has been practiced which affected their judgment and decision. *Ib.*
10. The principle reaffirmed that where the matters determined by the Land Office "are not properly before the Department, or its conclusions have been reached from a misconstruction by its officers of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected." *Ib.*
11. Sections 2450 to 2457 inclusive of the Revised Statutes, relating to suspended entries of public lands and to suspended land claims, and which sections require certain matters to be passed upon by a Board consisting of the Secretary of the Interior and the Attorney General, construed and held to apply only to decisions of the Land Office sustaining irregular entries, and not to decisions rejecting and cancelling such entries under the general authority conferred upon the Land Department in respect to the public lands. *Ib.*

RAILROAD.

1. The wife of the defendant in error, while travelling from Louisville to

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Washington on a through ticket, in a car of the plaintiff in error, and on a train conducted by his agents, was run off the track and down a bank in consequence of the weakness of a wheel which might have been known, and suffered a serious and lasting injury, for which an action was brought to recover compensation. The defence set up that at the time the accident happened the train was managed by a Connecticut company to whom the road had been leased. *Held*, that that fact would not bar a recovery; that if notwithstanding the execution of the lease the plaintiff in error, through its agents and servants, managed and conducted and controlled the train to which the accident happened, it would be responsible for that accident. *Chesapeake & Ohio Railway Co.* v. *Howard*, 153.

See CONSTITUTIONAL LAW, 5.

REMOVAL OF CAUSES.

1. The decision in *Fisk* v. *Henarie*, 142 U. S. 459, followed to the point that the words in the act of March 3, 1887, 24 Stat. 552, with regard to the removal of causes from a state court, (as corrected by the act of August 13, 1888, c. 866,) "at any time before the trial thereof," used in regard to removals "from prejudice or local influence," were used by Congress with reference to the construction put by this court on similar language in the act of March 3, 1875, c. 137, 18 Stat. 470, and are to receive the same construction, which required the petition to be filed before or at the term at which the cause could first be tried, and before the trial thereof. *McDonnell* v. *Jordan*, 229.
2. This was an ordinary action, under a state statute, for wrongfully causing the death of plaintiff's intestate, in which no Federal question was presented by the pleadings, or litigated at the trial, and in which the liability depended upon principles of general law, and not in any way upon the terms of the order appointing the receivers; and whatever the rights of the receivers might have been to remove the cause if they had been sued alone, the controversy was not a separable controversy within the intent and meaning of the act of March 3, 1887, as corrected by the act of August 13, 1888, and this being so, the case came solely within the first clause of the section, and it was not intended by Congress that, under such circumstances, there should be any difference between the rule applied under the first and second clauses of the act. *Chicago, Rock Island and Pacific Railway Co.* v. *Martin*, 245.

SCIRE FACIAS.

See NATIONAL BANK, 1.

STATUTE.

A. STATUTES OF THE UNITED STATES.

See BANKRUPTCY, 1;
COAL MINE, 1;
CONSTITUTIONAL LAW, 10;
INHERITANCE TAX, 1;
NATIONAL BANK, 1, 2;
NAVAL BOUNTIES;
NAVIGABLE WATERS;
PUBLIC LAND, 6, 11;
REMOVAL OF CAUSES.

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B. STATUTES OF STATES AND TERRITORIES.

California. *See* CONSTITUTIONAL LAW, 7.
Connecticut. *See* CONSTITUTIONAL LAW, 5.
Oregon. *See* CRIMINAL LAW, 2.
Tennessee. *See* CONSTITUTIONAL LAW, 4.

TRADE-MARK.

On the facts as detailed in the opinion of the court, it is *held* that there was no error in the decree of the court below. *Castner* v. *Coffman*, 168.

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DUE APR 27 1938
DUE FEB 8 1939
DUE FEB 15 1939
DUE MAR - 8 1940
DEC - 7 1943

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